

1984 CASE DIGEST INDEX

Editor's Note: The cases in the Index have been classified to conform to the Criminal Law Digest (third edition).

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PART I—STATE CRIMES

1. VALIDITY OF CRIMINAL STATUTES IN GENERAL

§ 1.00 Statute held not void for vagueness

Ohio Defendants were convicted of violating the Ohio Pyramid Sales Act, which provided that "no person shall propose, plan, prepare, or operate a pyramid sales plan or program."

While not challenging the definition of a pyramid sales plan, they asserted that the words "plan" and "prepare" in the above-cited section were used in an unconstitutionally vague manner. The lower court agreed and dismissed the indictments before trial; the intermediate appellate court affirmed the dismissals, but on the ground of overbreadth, not vagueness, as it found that the statute might encompass and penalize noncriminal conduct.

The Ohio Supreme Court reversed and remanded the actions for further proceedings holding:

[Where an enactment is questioned] on the ground that it is unconstitutionally overbroad it is extremely difficult to find unconstitutionality absent a particular state of facts to which the challenged statute may be applied. To find that a statute is facially overbroad—distinguishable from an ascertainment of vagueness—in effect is to hold that under no reasonable set of circumstances could any person lawfully be prosecuted thereunder. It is difficult to so hold especially in view of the strong presumption in favor of the constitutionality of legislation and the judicial obligation which exists to support the enactment of a lawmaking body if this can be done.

A conviction under the Pyramid Sales Act, it continued, required proof of

some movement or act toward the execution of a pyramid sales plan or scheme. The determination of whether and when such a movement or act has been performed can only be made by the trier of fact. It is not, however, a question of the facial constitutionality of the subject statutes.

Accordingly, the court found the statute facially sufficient. *State v. Beckley*, 448 N.E.2d 1147 (1983), 20 CLB 68.

§ 1.05 Statute held void for vagueness

U.S. Supreme Court An individual who was arrested and convicted for violating a California statute requiring persons who loiter or wander on the streets to provide "credible and reliable" identification and to account for their presence when requested by a police officer brought suit for declaratory and injunctive relief challenging the statute's constitutionality. The district court held the statute unconstitutional and the Ninth Circuit affirmed.

The Supreme Court affirmed, holding that the statute was unconstitutionally vague under the due process clause by failing to clarify what was contemplated by the requirement that a suspect provide "credible and reliable" identification. The Court noted that the statute, as drafted, vested virtually complete discretion in the hands of the police to determine whether the suspect had satisfied the statute. *Kolender v. Lawson*, 103 S. Ct. 1855 (1983), 20 CLB 58.

2. CONSTRUCTION AND OPERATION OF CRIMINAL STATUTES

§ 2.05 Statute broadly construed

Kentucky Defendant pled guilty to a charge of first-degree burglary committed by knowingly and unlawfully entering a building with intent to commit a crime and while in immediate flight therefrom he was armed with a deadly weapon, a shotgun. In fact, he stole the shotgun and left the premises with it. He was not armed with a deadly weapon when he entered the premises. The Kentucky statute provides: "When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a class A, B, or C felony and the commission of such offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or

other serious physical injury, such person shall not be eligible for probation, shock probation or conditional discharge." Upon the basis of this statutory provision, defendant's motion for probation was denied. On appeal, defendant raised the following question: Whether possession of a firearm obtained during the commission of a burglary constitutes use of a weapon so as to preclude eligibility for probation, shock probation, or conditional discharge?

The Kentucky Supreme Court construed the meaning that should be given to the phrase "use of a weapon" in the statute to be ambiguous in that it is subject to two entirely different but nevertheless logical interpretations. Defendant contended that mere possession of a weapon constitutes being "armed" with a weapon, but "use" of a weapon contemplates that it be employed in some manner in the commission of an offense.

The Commonwealth contended that the possession of a weapon involves its use, and that the intent of the legislature was to deter the involvement or presence of weapons in the commission of crimes.

Since the court could not determine the meaning the legislature intended to give the phrase "use of a weapon," defendant was entitled to the benefit of the ambiguity. Because there was no showing that a weapon was used in any manner to further the commission of the offense, the trial judge was found to be in error in his belief that probation was precluded by the statute. *Haymon v. Commonwealth*, 657 S.W.2d 239 (1983), 20 CLB 384.

3. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 3.00 Arson

Wyoming Defendant was found guilty of the offense of first-degree arson pursuant to a pre-1983 Wyoming statute which provided that "any person who willfully and maliciously sets fire to or burns . . . any dwelling house . . . shall be guilty of arson in the first degree." At trial he sought to raise the defense of diminished capacity. The court refused to give several proposed defense instructions that were based on the defense theory that defendant's capacity was diminished to the point where he was unable to form the specific intent that is an element of the crime of first-degree

arson. Instead, the court gave an instruction on mental illness and mental deficiency, since defendant had entered a plea of not guilty by reason of mental illness or deficiency. The defendant was found guilty and he appealed.

The Wyoming Supreme Court affirmed the verdict but modified the sentence on other grounds. First-degree arson was not a specific intent crime under the pre-1983 statute. The words "willfully and maliciously" describe the act to be committed rather than an intention to produce a specific result by committing that act. Jurisdictions that recognize the defense of diminished capacity usually restrict it to specific intent crimes, although the Wyoming court questions the rationale for this restriction. Since a statute existed defining the circumstances under which a person, by reason of mental illness or deficiency, was not responsible for criminal conduct, the court considered that the mental element necessary for commission of a crime was established and declined to usurp the powers of the legislature by enlarging on it. *Dean v. State*, 668 P.2d 639 (1983), 20 CLB 473.

§ 3.80 Drug violations

§ 3.85 —Possession

Kansas Following an automobile accident in which she was a driver, defendant was taken to a hospital for treatment of her injuries. She consented to the drawing of her blood and a sample, when analyzed, was found to contain cocaine. Based solely on the test result, she was charged with possession of cocaine. The trial court dismissed the indictment on defendant's motion, holding that one "does not possess a narcotic drug which is located in the bloodstream."

On appeal, the Kansas Supreme Court affirmed the dismissal, finding:

Once a controlled substance is within a person's system, the power of the person to control, possess, use, dispose of, or cause harm is at an end. The drug is assimilated by the body. The ability to control the drug is beyond human capabilities. The essential element of control is absent. Evidence of a controlled substance after it is assimilated in a person's blood does not establish possession or control of that substance.

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A defendant, it continued, must know of the presence of the controlled substance. While discovery of a drug in a person's blood is circumstantial evidence of prior possession, it does not establish knowledgeable possession, since "[t]he drug might have been injected involuntarily, or introduced by artifice, into the defendant's system."

As the prosecution's evidence failed to prove that defendant ever knowingly had possession of cocaine, the Kansas high court ruled that defendant was entitled to the dismissal. *State v. Flinchbaugh*, 659 P.2d 208 (1983), 20 CLB 69.

Virginia Defendant argued on appeal that the evidence was insufficient to sustain his convictions for possessing drugs with intent to distribute.

At trial, police officers testified that they observed defendant receive cash from a third party, then motion to Goode, who handed over an object which defendant then delivered to the third party. After observing several similar transactions, defendant and Goode were arrested and one Preludin pill was found on Goode's person. Only cash was found on defendant's person, grouped in amounts corresponding to the street value of a Preludin pill. Goode testified against defendant at trial to the effect that defendant had given him a number of pills and instructed him to return them as requested by defendant.

The Virginia Supreme Court rejected defendant's argument that he could not be convicted of constructively possessing drugs simultaneous with actual possession by another. It found from the evidence that defendant clearly knew of the presence and character of the pills and that they were subject to his dominion and control.

Accordingly, the court affirmed defendant's conviction. *Archer v. Commonwealth*, 303 S.E.2d 863 (1983), 20 CLB 65.

§ 3.220 Murder

South Carolina Defendant was convicted of murder, armed robbery, assault and battery with intent to kill, and conspiracy. After being found guilty of murder, the jury recommended that he should die by electrocution. Defendant appealed from these convictions and sentence. The prosecuting attorney made it clear that he was not prosecuting defendant on the theory of

felony murder. He maintained that defendant and another aided and abetted each other in the commission of a planned robbery and that the hand of one was the hand of the other. The judge charged the law of common-law murder applicable in South Carolina. Defendant argued that the trial court erred in denying his motion to strike armed robbery as an aggravating circumstance. The trial judge in the penalty phase of the trial instructed the jury that the only statutory aggravating circumstance which they were to consider was whether the murder was committed while defendant was in commission of the crime of robbery while armed with a deadly weapon, which is a statutory aggravating circumstance pursuant to the South Carolina Code.

The Supreme Court held that under the common-law rule of murder, no distinction is made between murder and felony murder, therefore a statutory aggravating circumstance of murder in a death penalty case remains as such regardless of whether the crime charged is murder or felony murder. Defendant was equally responsible for the stabbing death of the victim, even though he did not actually strike the fatal blows. Defendant and his cohort entered the store armed and did commit a robbery. As a direct result of their joint actions in committing the armed robbery the victim was killed. Consequently, there was no error in the trial judge's denying defendant's motion to strike armed robbery as an aggravating circumstance. *State v. Yates*, 310 S.E.2d 805 (1982), 20 CLB 385.

§ 3.265 Intoxicated Driving

Utah Defendant's car was pulled over after he crossed the center line several times in a short distance. Police noticed an odor of alcohol and slurring of speech and asked him to perform some field sobriety tests. He attempted to perform the tests, but in each case proved incapable. He was then advised about the implied consent law and asked to take a breathalyzer test. He consented, and here again failed to meet the standards for sobriety. At the trial, defendant's attorney did not object to the admission of the breathalyzer test results, but challenged the admission of the field test results on the grounds that the defendant should have been given a *Miranda* warning before being asked to

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give evidence against himself. The trial judge not only granted the motion to suppress, but dismissed all charges against the defendant. The district court reversed the dismissal, and defendant appealed.

The judgment of the district court was affirmed. The majority held that at the time field sobriety tests were given, the police had not taken defendant into custody but were merely pursuing an investigation, and therefore no *Miranda* rights applied. In determining whether defendant was in custody, the court looked at four factors: the site of interrogation; whether there were any physical signs of arrest, such as handcuffs; the length of the interrogation; and whether investigation centered on defendant. Although the investigation did center on defendant, the fact that it was not yet established that a crime had been committed was a mitigating factor. *Salt Lake City v. Carner*, 664 P.2d 1168 (1983), 20 CLB 262.

§ 3.350 Prostitution

Oklahoma Defendant argued for reversal of her conviction because the information charging her with soliciting for lewd and immoral acts lacked specificity and should have been dismissed. The factual portion of the information recited that defendant "Did solicit one Bobby Carter to commit an act of lewdness with her, the said defendant, by then and there asking the said Bobby Carter to engage in lewd acts with her for hire."

The Oklahoma Court of Criminal Appeals agreed and reversed, stating that "to be adequate, an information must apprise the defendant of what acts he or she must be prepared to meet in the prosecution of the case and to defend against any subsequent prosecution for the same offense."

Here, it found the language of the accusatory instrument was conclusory and failed to appraise defendant of the particular acts that gave rise to the charge. Accordingly, it held, the information was fatally defective. *Wirt v. State*, 659 P.2d 341 (Crim. App. 1983), 20 CLB 66.

4. CAPACITY

§ 4.10 Insanity—Substantive tests

Colorado Defendant pled guilty to the crime of escape, having fled from a state

mental hospital where he had been committed pursuant to an insanity adjudication in an earlier criminal proceeding. Thereafter, he moved for post-conviction relief, asserting that application of the escape statute to him violated constitutional due process guarantees because "a commitment following an insanity adjudication carries with it a continuing presumption of legal incapacity during the period of commitment." Defendant appealed following denial of his motion.

The Colorado Supreme Court affirmed, ruling that while an insanity adjudication represents a judicial determination that an accused is not legally responsible for past criminal acts because of then-existing mental disease or defect, such an adjudication would not render a committed person legally incapable of committing future crimes during the period of commitment. An adjudication of insanity, it continued, creates a presumption of insanity but does not operate as *res judicata* as to defendant's culpability for future criminal acts.

Here, defendant could have placed in issue his mental capacity to commit the crime of escape but, instead, elected to admit all elements of the crime. Accordingly, the court rejected defendant's contention, noting that to hold otherwise would lead to "a virtual grant of immunity for all criminal acts committed by persons adjudicated insane during the term of their insanity commitment." *People v. Giles*, 662 P.2d 1073 (1983), 20 CLB 175.

§ 4.20 —Burden of proof

Arizona Defendant was convicted of first- and second-degree murder for shooting his estranged wife and her male friend following an argument. At trial, he raised the defense of insanity, based on prolonged drug and alcohol abuse. The trial judge, with defense counsel approval, instructed the jury that "the defendant is presumed to have been sane at the time the offense was committed. Once sufficient evidence has been presented to raise the question of the defendant's sanity at the time of the offense, the state must prove beyond a reasonable doubt that the defendant was sane." Defendant appealed, on the ground that any instruction mentioning the presumption of sanity is improper.

The Arizona Supreme Court affirmed the conviction. Because the presumption

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of sanity vanishes when there is proof sufficient to raise a reasonable doubt about a defendant's sanity, and because trial judges are quite able to determine when that point is reached, it is not necessary to mention the presumption to the jury; nor should the presumption be mentioned, since it may confuse the jury. However, it is clear in this case that the jury understood the instruction and that its actions were consistent with it. Since the defense approved the instruction at the time it was given, the guilty verdict was affirmed in the absence of a showing of fundamental error. *State v. Grilz*, 666 P.2d 1059 (1983), 20 CLB 387.

6. DEFENSES

§ 6.15 Collateral estoppel

Florida Defendant was charged in a three-count indictment with (1) aggravated assault with a firearm, (2) aggravated battery with a firearm, and (3) possession of a firearm by a convicted felon. Before trial, his motion to sever the possession charge was granted and the case proceeded on the remaining two counts.

At trial, complainant testified that defendant beat him with his fists and with a pistol. Defendant, testifying in his own behalf, admitted hitting the complainant with his fists but denied having or using the pistol; no other eyewitness saw a pistol. After deliberations, the jury found defendant guilty of the lesser included offenses of simple assault and simple battery. Thereafter, the trial court granted a defense motion for dismissal of the firearms possession charge on the ground of collateral estoppel.

An intermediate appellate court reversed; it ruled that since the State had sought to try the three charges together, defendant, having moved for severance, could not then raise collateral estoppel as a defense.

The Florida Supreme Court reversed and ordered reinstatement of the dismissal. The test to determine the applicability of collateral estoppel as a bar to further criminal prosecution, it stated, is whether the factual issue in question was actually decided by the jury in reaching its verdict. Here, reasoned the court, the jury, by finding him guilty of simple assault and

battery rather than the aggravated crimes, must have decided that defendant did not hit the complainant with a pistol; it followed that the jury must have actually decided that defendant did not possess a pistol.

The court rejected the State's argument that the verdict was the result of jury compromise or exercise of jury "pardon power," noting that it would not engage in such speculation.

Finally, it concluded that defendant had not waived the right to assert collateral estoppel by moving for severance, stating that a finding of waiver would have the effect of requiring an accused to waive one constitutional right in order to assert another. The court explained:

[Defendant] moved to have the possession count severed so that evidence of his prior conviction could not be introduced so as to deprive him of his constitutional right to a fair trial. It would be unfair to encumber or restrict the exercise of this right by requiring him to waive his right against double jeopardy. Therefore, we hold that a defendant who successfully severs one charge from other charges is not estopped from asserting collateral estoppel as a bar to further prosecution under the severed charge. [Citation omitted.]

Gragg v. State, 429 So. 2d 1204 (1983), 20 CLB 69.

§ 6.17 Duress

Kansas Defendant and another were charged with burglary, kidnapping, and felony murder. Defendant informed the court that he intended to offer evidence to the jury that the crimes were committed under compulsion, in that the other person—who was dead at the time the trial took place—had held a gun on him and said defendant's family were being held hostage. The kidnapping victims testified, however, that defendant did the talking, and although he was alone with victims, for long periods, never indicated that he was under compulsion or duress. Defendant also made no attempt to contact his family to verify that they were held hostage. Trial court determined that (1) compulsion was not available as a defense to murder and (2) proffered evidence was not sufficient to prove compulsion. Defendant

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was convicted and appealed on the ground that he should have been allowed to use the compulsion defense.

Defendant's conviction was affirmed. Compulsion is only available as a defense where it is imminent, impending, and continuous. Defendant failed to account for the fact that he had several opportunities to escape and did not use them. *State v. Myers*, 664 P.2d 834 (1983), 20 CLB 263.

§ 6.20 Entrapment

Ohio Defendant was convicted of trafficking in marijuana. Testimony at a pretrial hearing and at trial established that an informant had participated in the sale negotiations. Defendant testified that this informant had called him numerous times, asking for drugs, which he had refused, until this particular instance. The sale was made to a narcotics agent, by direction of the informant. During discovery, defendant had attempted to locate the informant for purposes of his defense. As these efforts proved unsuccessful, defendant requested that the prosecutor divulge the informant's true identity. The prosecutor refused. Defendant contended that the informant's testimony was necessary to establish an entrapment. The trial judge refused to order disclosure of informant's identity, and found defendant guilty. On appeal, the issue presented was whether the identity of the police informant who negotiated the transaction resulting in defendant's arrest and conviction must be revealed.

The Ohio Supreme Court affirmed the trial judge, and reversed the court of appeals. The identity of the informant did not

have to be revealed where, although the defense of entrapment had been raised numerous times by defendant, there was no record of anything occurring between him and informant that might have constituted entrapment. Moreover, defendant twice had the opportunity to present such evidence in response to the trial judge's inquiry and having failed to do so, was denied discovery of police informant's identity. *State v. Butler*, 459 N.E.2d 536 (1984), 20 CLB 470.

§ 6.85 Justification

New York Defendant was convicted of criminal mischief. The charge along with several assault charges arose out of a bar-room incident during which defendant broke the glass in an emergency fire exit door. The issue before the court of appeals was whether defendant was entitled to a charge that the jury could find that his conduct was justified and therefore not criminal.

The court reversed and ordered a new trial because the trial court erred in ruling that the defense of justification was generally unavailable to one accused of criminal mischief. Defendant's testimony, that he broke the glass in an emergency fire exit door when he pushed on the door frame while attempting to retreat from an unprovoked assault by the owner of the bar, was sufficient to require the trial judge to give the requested charge on the defense of justification, despite the fact that he never admitted that he intended to cause property damage. *People v. Padgett*, 456 N.E.2d 795 (1983), 20 CLB 383.

PART II—STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

7. JURISDICTION AND VENUE

§ 7.05 Venue

California Defendant and his brother were charged with murder, rape, burglary, and kidnapping in connection with the death of a young white woman in a small, white community. The brother was found guilty in a separate trial and sentenced to death.

The defendant sought a peremptory writ to compel a change of venue.

The California Supreme Court granted the change of venue. It cited the influence of four factors which when taken together strongly indicated the need for a change of venue: (1) extensive publicity, including newspaper coverage of the crime and the brother's trial on a weekly or biweekly basis over a two-year period and coverage

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of the defendant's two arrests while on bail; (2) the small population (117,000) of the county where defendant would normally be tried; (3) the sensational nature and gravity of the offenses charged, even though the gravity may have been somewhat mitigated by the fact that the death penalty was no longer being sought; and (4) the status of the victim and the accused in the community, considering that the accused was a black with an arrest record in a community that was more than 99 percent white where he had no friends, whereas the victim came from a family prominent in the community. *Williams v. Superior Court*, 668 P.2d 799 (1983), 20 CLB 476.

B. PRELIMINARY PROCEEDINGS

§ 8.00 Grand jury proceedings

North Dakota A county court judge ordered the preliminary examination hearing of defendant, charged with murder and attempted murder, closed. In North Dakota, a preliminary examination is in lieu of grand jury proceedings and indictment. The purpose of the preliminary examination is to determine if a crime has been committed and if probable cause exists requiring the accused to stand trial. Defendant, with the concurrence of the state's attorney, requested the closing order. The county court requested and received briefs from all interested parties before issuing the order. The petitioners, various newspapers and broadcasters petitioned the Nebraska Supreme Court for an ex parte order staying the preliminary hearing of the defendant until the high court ruled on the petition challenging the order of the county judge closing the preliminary hearing.

The appellate court held that the county judge did not abuse his discretion in ordering the preliminary hearing closed to the news media. It stated that the purpose of a preliminary examination is to determine if a trial should be held to determine the guilt or innocence of the accused. It is also a safety device to prevent the accused's detention without probable cause. Generally only the prosecution presents evidence of his version of the matter. This may include hearsay and other prejudicial testimony not admissible at the trial, including evidence obtained by illegal means, and thus,

in certain circumstances, may violate the accused's constitutional right to a fair trial if such prejudicial testimony is made public before the trial. The court emphasized that it could not ignore the fact that pretrial publicity of inadmissible evidence can defeat the defendant's constitutional right to a fair and public trial, and added that pretrial prejudicial publicity has caused the reversal of a conviction. *Dickinson Newspapers, Inc. v. Jorgensen*, 338 N.W.2d 72 (1983) 20 CLB 380.

§ 8.10 —Immunity

New York Three felony complaints against defendant charged him with promoting gambling in the first degree and possession of gambling records in the first degree. The offenses allegedly occurred on April 17, May 3, and July 23, 1980. On August 28, 1980, defendant pled guilty to three misdemeanor offenses of attempting to promote gambling, in full satisfaction of the outstanding charges. The court accepted the plea and scheduled defendant to appear for sentencing on October 23, 1980. Prior to being sentenced, defendant testified before the grand jury concerning the May 3 transaction. Defendant did not assert his right against self-incrimination; nor did he sign a waiver of immunity prior to or during his grand jury appearance. However, after leaving the grand jury, defendant moved to dismiss the charges to which he had previously pled guilty but had not been sentenced, claiming that he had acquired immunity relying on provisions of the criminal procedure law dealing with transactional immunity. Defendant claimed that he had not executed a waiver and therefore he automatically acquired immunity pursuant to the statute.

The New York Court of Appeals ruled that a defendant who pleads guilty and then happens to give grand jury testimony concerning the offense before sentence is imposed cannot claim to have acquired statutory immunity from prosecution or punishment for the offense to which he has pled guilty. *People v. Sobotker*, 459 N.E.2d 187 (1984), 20 CLB 471.

§ 8.35 Pretrial proceedings

West Virginia Defendant allegedly assaulted a 10-year-old girl. At that time, defendant was age 31 and had been living with

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the mother of the girl. Defendant was arrested and retained an attorney. Defendant's preliminary hearing was held in his attorney's absence. Defendant was later indicted and convicted of sexual assault in the third degree. He contended that the holding of the preliminary hearing in the absence of his attorney constituted error.

The supreme court of appeals reversed and remanded holding that the absence of defense counsel at the preliminary hearing was not harmless beyond a reasonable doubt because defendant lost an important opportunity to effectively interrogate witnesses under oath prior to trial, at least with respect to impeachment. Furthermore, the record contained evidence that the victim's mother testified at the preliminary hearing, thus defendant, absent counsel, lost an opportunity at that hearing to discern her knowledge of the case. The mother did not testify at trial. *State v. Stout*, 310 S.E.2d 695 (1983), 20 CLB 381.

9. INDICTMENT AND INFORMATION

§ 9.00 Indictment and information

Delaware Defendant, convicted of delivering methamphetamine, argued on appeal that the indictment should have been dismissed because it failed to identify him by his proper name.

The indictment was issued in the name of James O. Mayo, after an undercover officer identified defendant's photo from police records listed under that name. At trial, defendant denied that he was known as James O. Mayo and produced various documents identifying himself as James O. Carter. Police witnesses testified that defendant was the person who sold the contraband to the undercover officer and that defendant's fingerprints matched those in the Mayo files.

The Delaware Supreme Court sustained the indictment invoking an exception to the general rule that "a substantial misnomer or mistake in either the Christian name or surname of a defendant will, as a general rule, vitiate an indictment and entitle the defendant to dismissal."

Where a defendant is known by an alias or other name, it held, an indictment charging him by either name is sufficient. In any event, stated the court, defendant had waived any objection to the misnomer

by failing to raise it before trial. *Mayo v. State*, 458 A.2d 26 (1983), 20 CLB 67.

Oklahoma *Wirt v. State*, 659 P.2d 341 (Crim. App. 1983). Discussed at § 3.350 *supra*.

11. DISCOVERY

§ 11.00 In general

§ 11.10 —Statements of co-defendants

Ohio Defendant was convicted of aggravated burglary and related crimes. On appeal, he contended that introduction of post-arrest statements made by a co-defendant, Neeley, violated state discovery requirements and prejudiced his defense, requiring reversal.

In accordance with Ohio rules of criminal procedure, defendant filed a demand for discovery seeking, *inter alia*, statements made by Neeley to law enforcement officers; the prosecutor responded that no such statements existed. At trial, however, the prosecutor attempted to establish, as part of his direct case, that Neeley told his arresting officer that he had spent the day of the crime helping a friend move; the officer's testimony was stricken on the ground that Neeley's statements had not been disclosed in response to defendant's demand for discovery.

In presenting his defense, defendant called alibi witnesses who testified that he had been ill in bed on the date of the crime and had been visited by Neeley several times during the day. In rebuttal, Neeley's arresting officer was again called by the prosecutor and, over objection, permitted to testify to Neeley's statements. Defendant argued that admission of Neeley's statements was improper because of the State's failure to comply with rules of discovery and prejudiced his defense by casting doubt upon his alibi evidence.

The Ohio Supreme Court, while agreeing that Neeley's statement was discoverable and should have been disclosed, found that nevertheless reversal was not warranted. It stated:

The trial court is vested with a certain amount of discretion in determining the sanction to be imposed for a party's nondisclosure of discoverable material. The court is not bound to exclude such material at trial although it may do so at its option. Alternatively, the court may order the noncomplying party to dis-

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close the material, grant a continuance in the case or make such other order as it deems just under the circumstances.

Here, the court continued, no abuse of discretion had occurred since (1) there was no suggestion that the State's failure to disclose was anything other than a negligent omission; (2) defendant did not request a continuance after admission of the disputed testimony; (3) defendant failed to allege how disclosure of Neeley's statements would have assisted the preparation of his defense; (4) in fact, defendant was aware of Neeley's statement prior to admission, as a result of the prosecutor's unsuccessful attempt to introduce it as part of his case-in-chief; and (5) Neeley's statement did not directly contradict defendant's alibi in any event. *State v. Parsons*, 453 N.E.2d 689 (1983), 20 CLB 170.

12. GUILTY PLEAS

§ 12.00 Plea bargaining

Hawaii Defendant pled guilty to theft and firearms possession charges as part of a plea bargain; in accordance with an understanding that such guilty pleas would dispose of all criminal charges pending against defendant, the prosecutor dismissed his pending indictment for armed robbery.

Unknown to the staff prosecutor who negotiated the plea and defense counsel, a police investigative report of defendant's participation in drug sales some six months earlier had been received by the office of the prosecuting attorney; defendant was indicted for promoting dangerous drugs approximately one month after the plea bargain.

Since the intent of the negotiated plea had been to resolve all open criminal matters against defendant, the prosecuting attorney agreed to dismiss the drug indictment. However, he left office before acting and his successor refused to dismiss, contending that the offenses charged were beyond the scope of the plea agreement.

The Hawaii Supreme Court affirmed a lower court's dismissal of the indictment, finding that the record supported defendant's contention that his guilty pleas were induced by the prosecutor's agreement to resolve all charges pending against him. While the drug charges had not been filed, said the court, the prosecutor's office was

on notice of their existence when the plea understanding was reached; due process, it concluded, mandated that they be included in the bargain. *State v. Yoon*, 662 P.2d 1112 (1983), 20 CLB 176.

§ 12.10 —Who may rely on prosecutor's promises

Arkansas Defendant was convicted of first-degree murder and sentenced to life imprisonment. Defendant sought post-conviction relief on the ground that her counsel was ineffective. Defendant alleged that after trial she learned that the deputy prosecuting attorney had spoken with her attorney outside her presence and offered to recommend a sentence of fifteen years' imprisonment if she would plead guilty. She contended that this offer of a negotiated plea was never communicated to her. Defendant attached to her petition an affidavit of the deputy prosecutor in which he states that he made the offer to her attorney. The prosecutor stated that her attorney rejected the offer immediately but said he would communicate it to his client. Her attorney later told the prosecutor that defendant had refused the offer.

The Arkansas Supreme Court denied the petition without prejudice with respect to this allegation. It stated that a plea agreement is an agreement between the accused and the prosecutor, not between counsel and the prosecutor. As such, counsel has the duty to advise his client of an offer of a negotiated plea. Here, however, defendant did not allege that she would have accepted the plea or that she would now accept it. The court found this to be a significant point because, even if it found merit to defendant's bare allegation that her plea was not communicated, there would be no grounds on which to set aside the finding of guilt or to order a new trial. The most that would be appropriate, said the court, would be a simple reduction in sentence to fifteen years. *Rasmussen v. State*, 658 S.W.2d 869 (1983), 20 CLB 386.

§ 12.30 Duty to inquire as to voluntariness of plea

California On the advice of his attorney, petitioner pled guilty to armed robbery and to assault with a deadly weapon, receiving a five-year sentence. The plea ar-

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rangement was a "package deal" under which the prosecutor offered reduced charges only if all three co-defendants pled guilty. The petitioner sought habeas corpus on the grounds that a "package deal" plea bargain arrangement would be inherently coercive.

The California Supreme Court denied the petition for habeas corpus. While a "package deal" plea bargain is not inherently coercive, the trial court is required to inquire into the totality of circumstances in accepting such pleas. The following factors are among those requiring consideration: (1) the prosecutor should not have misrepresented the facts to the defendant; nor should the plea have been induced by prosecutorial threats that if carried out would warrant ethical censure; (2) the evidence should support the confession of guilt, and the sentence should not be disproportionate to that guilt; (3) any promise of leniency for someone close to the defendant should be closely scrutinized since it might constitute a coercive inducement; (4) specific threats by a co-defendant should also be scrutinized for coercive effect. In this case, the fact that the petitioner believed his co-defendants might have attacked him if he refused to plead was not sufficient to show coercion. *In re Ibarra*, 666 P.2d 980 (1983), 20 CLB 389.

§ 12.55 Effect of involuntariness of plea

§ 12.65 —Promises

Mississippi Defendant was indicted for armed robbery committed February 4, 1979. Subsequent thereto he entered into a plea-bargaining agreement with the State on the advice of his attorney that he would be eligible while in custody to earn "good time" toward early release as would any other prisoner. The state statutory provisions regarding good time had remained unchanged since 1977, well before defendant's offense, but the interpretation of those statutes by the Mississippi Department of Corrections (MDC) had changed. As a consequence, prisoners convicted of armed robbery after 1977 who were sentenced to serve less than ten years were administratively barred from earning good time after January 5, 1981, although good time earned prior to that date was not taken away. On June 20, 1981, defendant

was advised in an official MDC memorandum that he was eligible for no more good time, and therefore must serve some two years eight months more than was formerly required. Thereupon, defendant filed a petition in the circuit court asking either that the court permit withdrawal of the guilty plea or grant specific performance of the plea agreement, whichever was appropriate. The court summarily dismissed defendant's petition.

The Mississippi Supreme Court held that defendant was entitled to withdraw his guilty plea made in reliance on erroneous advice from his attorney because such a plea constitutes a waiver of some of the most basic rights of free citizens, i.e., those secured by the Fifth, Sixth and Fourteenth Amendments to the Constitution, as well as comparable rights under the state constitution. Therefore, the court reversed and remanded for an evidentiary hearing stating that should defendant prove that which he has alleged, all of the substantive relief he could possibly receive would be a vacation of his guilty plea and reinstatement of his not guilty plea. The state would then be free to put defendant to trial under the indictment. *Tiller v. State*, 440 So. 2d 1001 (1983), 20 CLB 382.

§ 12.70 Motion to withdraw guilty plea

North Dakota Defendant, charged with issuing a bad check, appeared without counsel and entered a guilty plea after the court advised her of the nature of the charges and her right to counsel. Imposition of sentence was stayed. Subsequently, defendant consulted with an attorney and moved to withdraw her guilty plea on the ground that meritorious defenses to the charge existed. The trial court denied her motion.

On appeal, the North Dakota Supreme Court affirmed, stating, "in the absence of an abuse of discretion on the part of the trial court, its decision to deny defendant's motion to withdraw her guilty plea will stand."

Here, said the high court, the record showed that defendant was advised by the trial judge and understood the charge against her. The trial judge, it continued, was under no "obligation to explore with the defendant any or all conceivable defenses that may be raised"; further, it noted, defendant had pled guilty to a simi-

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lar charge a year earlier, having been represented by counsel on that occasion, and so had the benefit of at least one attorney's advice.

Accordingly, it held, the trial judge's denial of defendant's motion to withdraw her guilty plea was not an abuse of discretion. *State v. Stai*, 335 N.W.2d 798 (1983), 20 CLB 174.

13. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 13.20 Relevancy and prejudice

Mississippi Defendant was convicted of possession of marijuana with intent to transfer or distribute it. During the trial, a state expert testified on the reasons why marijuana was classified as a controlled substance. Defendant appealed concerning the admission of this testimony and on other grounds.

Defendant's conviction was affirmed. Although the testimony was not relevant and should not have been permitted, the strength of the evidence against defendant prevented a finding of prejudice. The fact that the case was not a "close" one also led to a finding of harmless error on another appeal by defendant based on the fact that the prosecutor asked questions suggesting the existence of evidence that was not in fact brought before the jury. The case was remanded for re-sentencing on other grounds. *Burns v. State*, 438 So. 2d 1347 (1983), 20 CLB 267.

North Carolina Defendant, convicted of murder, armed robbery, and related crimes, argued on appeal for a reversal because his two former co-defendants, testifying for the prosecution, were allowed to state that they had already pled guilty to the same charges.

The North Carolina Supreme Court disagreed that admission of the co-defendant's testimony constituted prejudicial error. Evidence of a nontestifying co-defendant's guilty plea cannot be introduced as evidence of the guilt of the defendant on trial, stated the court, because to do so would violate the defendant's right of confrontation as well as "the rationale that a defendant's guilt must be determined solely on the basis of the evidence presented against him."

However, it continued, no right of a defendant on trial is prejudiced where a wit-

ness discloses his own participation in the crimes and that he has pled guilty to the charges. *State v. Rothwell*, 303 S.E.2d 798 (1983), 20 CLB 65.

§ 13.35 Chain of Possession

Iowa Defendant was convicted for burglary and the determination that he was a habitual offender. On appeal, he contended that the trial court erred in admitting into evidence a pair of gloves because a proper chain of custody was lacking. At trial, an accomplice identified and claimed ownership of a pair of gloves received into evidence over defendant's objection. In particular, the accomplice testified that he had loaned the gloves to defendant on the night of the burglary. While he did not specifically describe any distinguishing characteristics of the gloves, he stated they were clean when he loaned them and later they were dirty and smelled of beef (the case involved burglary and theft of beef). After defendant and two other individuals were arrested, the vehicle they occupied was seized by the police, impounded and searched. No gloves were found during this procedure. Later the owner picked up the U-Haul truck and while cleaning it, one of the owner's employees discovered the gloves lying on the floor and turned them over to the police. At trial, he identified the gloves as the ones found in the truck.

The Iowa Supreme Court found that the trial court did not abuse its discretion in admitting the gloves into evidence for two reasons. First, the gloves were a solid object, and they were properly identified by both the owner-accomplice and the employee. Second, there was no material change or alteration in the condition of the gloves. Therefore, the chain of custodial evidence provided an adequate foundation for the admission of the gloves. *State v. Hutchison*, 341 N.W.2d 33 (1983), 20 CLB 478.

§ 13.45 Character and reputation evidence

Georgia Defendant was convicted of murdering his 20-month-old daughter. On appeal, he argued that he was entitled to a reversal because of the trial court's erroneous ruling that he had placed his character in issue; that ruling enabled the

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State to introduce evidence of his bad character, i.e., prior convictions for sodomy and theft. The court's disputed decision came after the following cross-examination of a prosecution witness:

"Q. [Y]ou don't have such a good feeling about Wayne Franklin, do you?

A. He's all right.

Q. And you said Wayne's all right. I say you say that Wayne's all right?

A. Uh-huh."

The Georgia Supreme Court affirmed defendant's conviction, holding that the quoted exchange amounted to an inquiry into character and that, as a matter of law, defendant had placed his character in issue.

Consequently, the court held, the State had the right to rebut the evidence of defendant's good character by introducing evidence of prior convictions for crimes of moral turpitude. Even if error was committed, concluded the court, it was harmless in view of the remaining overwhelming evidence of guilt. *Franklin v. State*, 303 S.E.2d 22 (1983), 20 CLB 69.

§ 13.60 Proving intent

New Hampshire Defendant was convicted of disposing of stolen property, a stereo system. The stereo and a handgun had both been stolen from the complainant's home at the same time. The stereo was recovered from a party who bought it from defendant; the handgun was not recovered.

At trial, testimony established that defendant had attempted to sell both the stereo and a handgun identical to the one stolen from the complainant to a third party on the day of the theft. It was also shown that defendant, an acquaintance of the complainant, was very familiar with the handgun.

On appeal, defendant argued that testimony relating to the handgun was unduly prejudicial because it suggested that he had stolen the weapon, an uncharged crime.

The New Hampshire Supreme Court disagreed with defendant, finding that the disputed evidence was admitted properly. Evidence concerning defendant's familiarity with the handgun, it stated, was rele-

vant on the issue of defendant's knowledge that the stereo was stolen "because it showed that, if the revolver had been presented to him along with the stereo, he would have recognized the gun as having been stolen from [the complainant] and would therefore have known or believed that the stereo was also stolen."

The trial judge, continued the court, had specifically instructed the jury to consider the testimony only on the issue of defendant's intent; moreover, it found, there was no reason to believe that the implication that defendant had stolen the handgun and the stereo at the same time caused the jury "to view him in a substantially more negative light" than if the evidence was limited to theft of the stolen stereo only.

Accordingly, it concluded that the probative value of the disputed evidence was not outweighed by any prejudicial effect it may have had. *State v. Donovan*, 462 A.2d 125 (1983), 20 CLB 178.

§ 13.70 Circumstantial evidence

§ 13.80 —Flight

Indiana Defendant, convicted of robbery and theft, argued on appeal that a reversal was required because the trial court erred in charging the jury that evidence of defendant's flight from police could be considered by them as evidence of consciousness of guilt.

At trial, it was established that defendant robbed the complainant in her apartment at gunpoint, taking cash, jewelry, and car keys. She then discovered that her car was missing. Three days later, a state trooper observed defendant make an illegal U-turn and attempted to pull defendant over for the traffic violation. Defendant refused to pull over and increased his speed; he was finally stopped at a roadblock and a check on the car revealed that it had been stolen.

On appeal, he argued that his attempted flight from police related only to the traffic violation and not the robbery-theft charges, and that the jury was misled by the trial judge's instruction on flight.

The Indiana Supreme Court rejected defendant's claim stating, "[I]t is well established that flight may be considered as circumstantial evidence of guilt." To ascer-

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tain whether a jury instruction on flight is applicable, continued the court, "all reasonable inferences that may be drawn from the evidence must be considered."

Here, it found, defendant was fleeing from police in a car three days after it was stolen, supporting the reasonable inference that defendant would not have fled if the car were not stolen. Accordingly, the instruction on flight was relevant to the charges and was not given erroneously. *Potter v. State*, 451 N.E.2d 1080 (1983) 20 CLB 173.

§ 13.95 Opinion evidence

Indiana Defendant, convicted of burglary, argued on appeal that there should be a reversal because the trial court erroneously refused to allow prosecution witness to give opinion evidence on cross-examination.

It was established at trial that police arrived at the subject premises, a house owned by Reid, approximately two minutes after receiving a report that someone was kicking down the front door. Upon arrival, they found the door broken open, with the premises in disarray and defendant hiding under the bed.

Defendant claimed that he had gone to the premises to visit Reid; arriving to find the door broken open, he entered to check on Reid's safety and hid from police because he was wanted on an unrelated charge. To give validity to defendant's account, defense counsel attempted to question prosecution witness as to whether the crime could have been committed within two minutes and whether defendant could have entered after the crime occurred, but before police arrived. However, prosecution objections were sustained, which rulings defendant claimed constituted reversible error.

The Indiana Supreme Court affirmed the conviction, noting the general rule that witnesses may testify only to specific statements of fact, not opinions. While opinion testimony may be given in certain exceptional circumstances, it is not permissible "when the jurors are as well qualified to form an opinion on the facts as the witness."

The court stated:

Here the defendant's questions called for opinions from the witnesses which

are within the jurors' knowledge. The jurors were presented with the circumstances of the crime, and the defendant's version, and the time element. The jury was well qualified to form an opinion as to the possibility of the defendant's actions under the circumstances. In fact, it was the jury's role to do so as the trier of fact.

It concluded that the trial court had not erred in sustaining the State's objections. *Hensley v. State*, 448 N.E.2d 665 (1983), 20 CLB 73.

North Carolina Defendant was convicted of sexual abuse. He argued on appeal that he was entitled to a new trial because an expert psychiatric witness, testifying for the prosecution as to the result of his examination of the complainant, was erroneously permitted to express his opinion of defendant's guilt.

The challenged testimony was adduced as follows:

"Q. Doctor Danoff, do you have an opinion based upon your medical training and experience as to whether or not James was fantasizing in any manner in his account of this situation?

Objection.

Court: Overruled; you may answer.

A. Yes, I do.

Court: The answer to that question is yes or no; do you have an opinion?

A. Yes, I do.

Q. What is that opinion?

A. That an attack occurred on him; that this was reality.

Motion to strike.

Court: Motion denied."

On appeal, the North Carolina Supreme Court reversed, agreeing that the expert's testimony that "an attack occurred on [complainant], that this was reality" exceeded the proper function of expert testimony as an aid to the jury in determining factual issues and amounted to an improper opinion that defendant was guilty.

Expert testimony is admissible, the court said, if (1) the witness, because of his expertise, is in a better position to have an opinion on the subject than the trier of fact; (2) the witness testifies only that an event could or might have caused an injury but does not testify to the conclusion that the event did in fact cause the injury, un-

less his expertise leads him to an unmistakable conclusion; and (3) the witness does not express an opinion as to the defendant's guilt or innocence.

Here, it found, the expert was properly qualified under the first criterion but his testimony violated the second and third criteria. The expert did not testify that the complainant's mental state was consistent with one who had been sexually attacked or that such an attack "could" have caused his mental state; rather, the testimony was that such an attack had occurred.

Accordingly, the expert's testimony was unresponsive and should have been stricken. Refusing to find the error harmless because the case involved close questions of credibility, it reversed. *State v. Keen*, 305 S.E.2d 535 (1983), 20 CLB 171.

§ 13.170 Privileged communications

North Dakota Defendant, convicted of rape and kidnapping, argued on appeal that there should be a reversal because statements he made to his wife during a post-arrest telephone conversation were admitted into evidence at trial, violating both his Fourth Amendment rights and the spousal privilege.

Following his arrest on the charges, defendant was permitted to telephone his wife. The call was placed by a jailer, who remained beside him during the ensuing conversation and overheard the following: "It looks bad. I don't know, it feels bad, it looks bad. . . . I just didn't learn. . . . I'm sorry. I don't know why it happened. I'm sorry." Defendant turned away from the jailer during the call, but did not lower his voice or request privacy.

After the above statements were introduced over his objection, defendant called his wife as a witness. She testified that, in the context of their telephone conversation, defendant's statements were only admissions that he had consensual sex with the complaining witness, apologies for his infidelity, and observations that the possibility of release on bail "looked bad."

On appeal, defendant argued that he had a reasonable expectation that his telephone conversation would be private and that because the conversation was used against him, he was compelled to waive

the spousal privilege to give an explanation.

The North Dakota Supreme Court rejected defendant's claims, finding:

[Defendant] was a prison detainee who, under the circumstances, knew or should have expected his conversation would have been overheard or monitored and would not be private. These facts compel us to hold that [defendant's] statements were not made privately nor intended to go undisclosed to any other person.

Constitutional rights of prisoners, it explained, are subject to certain restrictions and the Fourth Amendment does not prevent jail officials from monitoring, even surreptitiously, conversations between detainees and visitors or others; use of such conversations against a detainee at trial does not amount to a constitutional violation.

The court reasoned that since defendant had no reasonable expectation of privacy in the conversations, the spousal privilege, which protects only private, confidential communications, was not applicable. Defendant's statements to his wife, it concluded, were properly admitted. *State v. McKercher*, 332 N.W.2d 286 (1983), 20 CLB 70.

§ 13.175 Duty of court to advise witness of right to counsel and privileges against self-incrimination

Maine Defendant was charged with failure to stop for a police officer, having failed to pull his vehicle over in response to an officer's signals and almost running the officer over in the process. At trial, defendant testified that his companion in the car, Babbitt, not he, had been the driver and that in any event neither he nor Babbitt had noticed the officer.

Defendant then called Babbitt as a witness. The trial judge, sua sponte, advised Babbitt that evidence had been adduced that an attempt had been made to run down a police officer, that he, Babbitt, was the driver, and that he could be implicated in the crimes of failure to stop for a police officer, reckless conduct with a dangerous weapon, and obstructing a police investigation. The judge went on to advise Babbitt of the penalties carried by each crime and that he had a Fifth

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Amendment right to decline to testify; he also afforded Babbitt an opportunity to consult with an attorney. After speaking with counsel, Babbitt elected not to testify.

Defendant was convicted and, on appeal, argued that the judge's cautionary warning to Babbitt violated his right to obtain witnesses in his favor.

The Maine Supreme Judicial Court reversed the conviction. While recognizing that there is an important interest in protecting a witness's right against self-incrimination and that a trial judge should advise a witness of his rights when the witness may unknowingly incriminate himself, the court held that "warnings concerning the exercise of the right against self-incrimination, however, cannot be emphasized to the point where they serve to threaten and intimidate the witness into refusing to testify."

Here, it found, the trial judge's warnings went beyond simply informing Babbitt that he had a right to refuse to testify and a right to consult with counsel; by emphasizing the seriousness of the crimes and emphatically and repeatedly advising Babbitt that he could elect not to testify, said the court, the trial judge effectively "drove the witness off the stand."

As Babbitt's testimony was critical in corroborating defendant's version of the facts, the trial judge's actions deprived defendant of a fair trial, requiring reversal, it concluded. *State v. Fagone*, 462 A.2d 493 (1983), 20 CLB 180.

§ 13.185 Witness's refusal to answer questions—effect

New York Defendants, convicted of assault and possession of a weapon, argued on appeal that a new trial was required because the prosecution called the victim as a trial witness, knowing that he would refuse to testify.

The victim, Iovino, appeared at trial but expressed a reluctance to testify. Counsel was assigned and, after conferring with Iovino, advised the court that Iovino would not testify if called; no reason was given for the refusal. Nevertheless, the court permitted the prosecution to call Iovino; when he refused to answer any questions concerning the assault despite the court's admonitions, the jury was excused and Iovino was held in contempt.

Upon the jury's return, the court gave an instruction that the witness's refusal to testify was not to be considered during deliberations.

An intermediate appellate court reversed the convictions, concluding that the trial judge erred in allowing the People to call Iovino once it was clear that he would not testify because his refusal gave rise to a natural inference that he feared reprisals.

The New York Court of Appeals, however, reversed and reinstated the convictions. A decision to permit the prosecution to call a witness who has indicated a refusal to testify is a matter of the trial judge's discretion, it held, stating:

[O]nce a witness has communicated that intent, the trial court must determine whether any interest of the State in calling the witness outweighs the possible prejudice to defendant resulting from the unwarranted inferences that may be drawn by the jury from the witness's refusal to testify. The trial court's exercise of discretion is subject to review by this court only on the basis of whether that discretion was abused.

Permitting a prosecutor to call a recalcitrant witness would be reversible error if the prosecutor's motivation was to create unwarranted inference against the defendant in the minds of jurors or otherwise bolster his case in a manner not subject to cross-examination, the court held. Here, however, there was no indication that the prosecutor was guilty of misconduct, as he never commented on or attempted to exploit Iovino's refusal to testify and his case was fully established through other evidence.

Moreover, Iovino had not expressed his unwillingness to cooperate until just before he was called; the court stated that under these circumstances, "it was not unreasonable for the prosecutor to attempt to induce the witness to again change his mind about testifying by putting him before the jury and having him admonished regarding the court's contempt power."

As the prosecutor had a legitimate interest in calling the witness and did not exploit his refusal to testify, the case against defendants was strong and an appropriate curative instruction was given, the New York high court concluded that

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there had been no abuse of discretion. *People v. Berg*, 451 N.E.2d 450 (1983), 20 CLB 177.

§ 13.195 Expert witnesses

Iowa Defendant was convicted of first-degree murder. To support the first-degree charge, prosecutor introduced evidence that the murder was committed in the course of a rape. A psychiatrist who had examined defendant and his history testified for the state as to the psychology of rapists and characterized defendant as one of the class of aggressive, antisocial, or sociopathic hatred rapists. Defendant appealed on the ground, *inter alia*, that this evidence should not have been admitted.

The conviction was affirmed. Testimony was reasonably admitted to rebut defendant's contention that sexual intercourse with victim was consensual. *State v. Hickman*, 337 N.W.2d 512 (1983), 20 CLB 268.

§ 13.230 Cross-examination—right to use witness's prior statements

§ 13.245 —Impeachment by prior conviction

Nebraska Defendant was found guilty of attempted sexual assault in the first degree. The 14-year-old prosecutrix testified that, while she was being held in jail as a material witness, the defendant, a jailer, invited her to watch television in the jailer's station and then sexually assaulted her. Defendant contended that it was she who began kissing him, and that sexual intercourse had not taken place. Defendant's motion to introduce evidence of prosecutrix's previous juvenile convictions in order to impeach her testimony was denied, and he appealed.

The conviction was affirmed. Nebraska law does not provide for the admission of evidence of prior juvenile convictions of a witness for impeachment purposes. The court distinguished the case from the Supreme Court decision in *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105 (1974), that defendant should have been allowed to introduce evidence of a witness's prior juvenile convictions. In the *Davis* case, defendant sought to establish that the witness was on juvenile probation and thus subject to coercion by the state in that if he failed to testify against the defendant his

probation might be revoked; in the *Beach* case, however, no bias or motive would be shown by prosecutrix's prior juvenile convictions. *State v. Beach*, 337 N.W.2d 772 (1983), 20 CLB 269.

§ 13.305 Sequestration of witnesses

Louisiana Defendant was found guilty of first-degree murder. Motion by defense to sequester witnesses present in the courtroom during voir dire was denied by trial judge. Defendant appealed on this and other grounds.

The conviction was affirmed. Under the Louisiana statute governing sequestration of witnesses, a trial judge must grant a motion to sequester, whether made by defense or prosecution. His discretion is limited to modifying the order once it is granted. However, nothing was brought out during the voir dire that could have influenced the testimony of a witness; therefore the error resulted in no prejudice to defendant. *State v. Johnson*, 438 So. 2d 1091 (1983), 20 CLB 267.

§ 13.310 Res gestae witness

Alabama Defendant was convicted of robbery and murder; the victim's husband was also killed in the same incident and defendant contended on appeal that he was prejudiced by the admission of evidence relating to the husband's death. The evidence consisted of defendant's post-arrest statement incriminating himself in both killings, photographs of the husband's body, and testimony concerning his wounds.

The Alabama Court of Criminal Appeals affirmed the conviction. The two deaths, it found, were "the result of one continuous transaction, consisting of several inextricably intertwined acts." Evidence of the husband's death it held, was admissible at defendant's trial for killing the wife as "part of the res gestae and as shedding light on the acts, motive and intent of [defendant]." *Godbolt v. State*, 429 So. 2d 1131 (Crim. App. 1983), 20 CLB 67.

§ 13.315 Hearsay evidence

§ 13.320 —Recorded statements

Nebraska Defendant was convicted of the felony offense of delivering cocaine. On

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appeal, he assigned as error the admission of certain tapes of telephone conversations. Critical to the conviction of defendant were two recordings of telephone conversations between defendant and a supervisor of the State Patrol drug division named Wagner. Wagner testified that he was acquainted with defendant; that during the three or four months preceding the calls in question he had approximately twenty phone conversations and six personal meetings with defendant; that he was familiar with his voice; that during such phone calls Wagner either asked for defendant or made sure that it was defendant to whom he was talking by asking, "Is this Bobby?"; and that he was able to identify the voice recorded on the two cassettes as that of defendant.

The Nebraska Supreme Court found that for a tape recording of a telephone conversation between a witness and a defendant to be admissible in evidence it need only be shown that the conversation is relevant; that it accurately reflected the conversation; that the tapes had not been altered, changed, or erased in any way; and that the voices heard on the tapes were those of the witness and defendant. *State v. Pearson*, 338 N.W.2d 445 (1983), 20 CLB 386.

§ 13.335 —Guilty pleas of co-defendant

Delaware Defendant was convicted of multiple drug offenses based upon evidence seized when police executed a search warrant at residential premises while defendant and others were present. All of the five persons present had been arrested and indicted for the same charges, but two pled guilty to the lesser offense of simple possession of drugs prior to trial, pursuant to plea bargains with the state.

At trial, defendant attempted to introduce evidence of his co-defendants' guilty pleas in an effort to corroborate his defense that the seized drugs were not his; the trial court refused to admit the guilty pleas into evidence.

On appeal, the Delaware Supreme Court affirmed the conviction, finding that the co-defendants' guilty pleas did not amount to "confessions" to the crimes charged against defendant. The co-defendants, it noted, pled guilty only to the

charges against themselves and did not admit to exclusive possession of the drugs.

Moreover, stated the court, the guilty pleas were hearsay and were not admissible as statements against interest since (1) defendant failed to establish that the co-defendants were unavailable as trial witnesses; (2) the guilty pleas could be taken as evidence of the co-defendants' guilt but, as exclusive possession was not admitted, did not exonerate defendant; and (3) defendant failed to produce corroborating circumstances establishing the trustworthiness of the guilty pleas which, as part of a plea bargain, were potentially self-serving.

Therefore, decided the court, evidence of the guilty pleas was excluded properly. *Potts v. State*, 458 A.2d 1165 (1983), 20 CLB 179.

§ 13.371 —Drawings and sketches

Illinois Defendant was convicted of murder and burglary. After a separate sentencing hearing, the trial court sentenced defendant to death and also imposed a sentence of fourteen years' imprisonment for the burglary. On direct appeal to the Illinois Supreme Court, defendant attacked his convictions on numerous grounds among which was his claim that it was reversible error for the trial court to refuse to admit as inadmissible hearsay the police artist's sketch, which was offered for the purpose of impeaching the identification testimony of two prosecution witnesses. The state contended that the sketch was properly excluded because defendant did not establish a proper foundation for its admission into evidence.

The high court held that where the sketch is used for impeachment purposes as a prior inconsistent description of the assailant and where authenticity has been established, unequivocal testimony from the person who prepared the sketch which also establishes that the identification witness previously adopted and confirmed it as an accurate drawing is sufficient foundation for its admission despite a denial by the identifying witness that he had agreed to its accuracy. That denial is, of course, admissible and relevant in the jury's assessment of the extent to which the drawing is, in fact, impeaching. *People v. Yates*, 456 N.E.2d 1369 (1983), 20 CLB 383.

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WEIGHT AND SUFFICIENCY

§ 13.380 Sufficiency of evidence

§ 13.385 —Drug violations

Kansas State v. Flinchbaugh, 659 P.2d 208 (1983). Discussed at § 3.85 *supra*.

Virginia Archer v. Commonwealth, 303 S.E.2d 863 (1983). Discussed at § 3.85 *supra*.

§ 13.434 Fingerprints

Nebraska Defendant was convicted of burglary after a jury trial. As part of the prosecution's preparation for trial, an affidavit prepared by a Nebraska state patrolman was submitted to the district court, seeking an order pursuant to the state Identifying Physical Characteristics Act, to compel defendant to submit to fingerprinting and palm printing. The affidavit stated, among other things, that defendant was to voluntarily give a sample of his fingerprints and palm prints and that defendant refused. An order requiring defendant to so submit was entered. Pursuant to the order, a palm print was taken from defendant which matched the one on the glove wrapper found on the floor of the store during the burglary investigation. Defendant contended on appeal that his motion to suppress the palm print exemplar was erroneously denied. Defendant argued that the statute was constitutionally infirm in that it authorized him to be unreasonably seized by police authorities in violation of the Fourth Amendment as well as the Nebraska Constitution.

The Nebraska Supreme Court held that the Act providing for an order compelling a suspect to produce nontestimonial evidence for identification was constitutional. However, the court construed the Act to require a showing of probable cause to believe the person to be seized has engaged in an articulable criminal offense prior to the judicial officer issuing an order pursuant to the Act. The court added that it would be anomalous to require such probable cause prior to the seizure of papers, book, and other objects, but not for the seizure of persons. **State v. Evans**, 338 N.W.2d 788 (1983), 20 CLB 380.

14. TRIAL

§ 14.20 Qualifications of prosecutor

New York Seeking to avoid charges of political bias, a district attorney appointed a "special assistant district attorney" to handle criminal investigation and prosecution of the incumbent of DA's former congressional seat. The memorandum of understanding gave the special prosecutor "full authority and responsibility to investigate, to determine whether to prosecute, and to prosecute any person" for offenses related to the congressman's campaign for office, and went on to grant him broad authority and great independence in pursuing the investigation. The congressman petitioned, challenging the appointment and seeking to disqualify the district attorney from proceeding against him herself. Lower courts held the appointment to be void, and appeal was brought.

The holding that the appointment was void was affirmed. The district attorney's powers are conferred by statute. "She may delegate duties to her assistants but she may not transfer the fundamental responsibilities of the office to them." The memorandum concerning the appointment of the special prosecutor was clearly an attempt by the district attorney to divest herself of her discretionary judgment to initiate, pursue, and conclude investigations and prosecutions, and was therefore void. Regarding the issue of the district attorney's disqualification to conduct an investigation herself, on which lower courts issued conflicting opinions, the issue was raised prematurely. The mere fact that the district attorney had expressed misgivings about conducting the investigation herself was not sufficient to provide a basis for the court to assume jurisdiction to pass on her qualifications. **Schumer v. Holtzman**, 454 N.E.2d 522 (1983), 20 CLB 267.

§ 14.150 Conduct of prosecutor

§ 14.165 —Comments made during summation

Missouri In defendant's trial for rape, most of the evidence consisted of the conflicting statements of victim and defendant. As part of his closing argument, prosecuting counsel attempted to define

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the standard of proof as "beyond reason and common sense." After defendant made a timely objection, which was overruled, he told jurors that the jury instructions meant that they should find defendant guilty if their common sense told them defendant committed the crime. Defendant was found guilty and appealed.

The Missouri Supreme Court found the prosecutor's remarks to be reversible error. The Missouri Approved Jury Instructions specifically provide that neither court nor counsel is to define nor elaborate on the instructions regarding the burden of proof. Here an incorrect definition was offered in the face of sharply controverted evidence of guilt, and may conceivably have tipped the balance in favor of conviction. *State v. Williams*, 659 S.W.2d 778 (1983), 20 CLB 474.

§ 14.170 —Comment on defendant's failure to testify

Mississippi Defendants were charged with possessing drugs when police officers executed a search warrant at their residence, finding marijuana and certain controlled substances in capsule and tablet form.

At trial, they called no witnesses. When, on summation, the prosecutor made several references to the "undisputed facts," defendants moved for a mistrial, which was denied. On appeal following their convictions, defendants argued that the prosecutor had improperly commented on their failure to offer evidence or testify.

The Mississippi Supreme Court affirmed the convictions, stating that since defendants could have produced a witness who was present when the search was made, the prosecutor's comments on their failure to dispute the state's evidence was not error.

Further, it continued, while reference to an accused's failure to testify is forbidden, any error committed by the prosecutor was harmless beyond a reasonable doubt, given the overwhelming evidence against defendants and their "total failure . . . to dispute the evidence in any manner."

Finally, any prejudice to defendant was cured by the trial judge's admonition to the jury that defendant's failure to testify was not to be considered. *Lee v. State*, 435 So. 2d 674 (1983), 20 CLB 173.

§ 14.180 —Comment on failure of defense to call certain witnesses

Connecticut Defendant, a deputy sheriff, was convicted of larceny for depositing tax monies he collected into a personal checking account. At trial, defendant testified in his own behalf and was cross-examined as to the checks written to various payees.

In rebuttal of defendant's explanation of such payments, the prosecution subpoenaed one payee, Jamele. Jamele, who was facing federal prosecution for gambling activities and tax evasion, was examined outside of the presence of the jury; he declined to answer questions concerning the payments on Fifth Amendment grounds. The trial court sustained Jamele's right to remain silent, forestalling any examination of the witness before the jury.

During summation, the prosecutor remarked, "Where is Nick Jamele? Where is the man [defendant] paid six thousand dollars to?" Defendant's request for a mistrial was denied.

On appeal, the Connecticut Supreme Court rejected the State's argument that any prejudice occasioned by the prosecutor's summation was harmless in view of the overwhelming evidence against defendant, holding that "the prosecutor's argument to the jury was improper both because the inference sought was clearly impermissible and because it demonstrated a complete disregard for the tribunal's rulings." Once the trial judge had ruled that Jamele could refuse to testify, Jamele was not an available witness and neither party could argue that the jury should draw an unfavorable inference from his absence.

The prosecutor here purposefully disregarded the trial judge's ruling by suggesting that defendant had an obligation to produce an unavailable witness. Such a deliberate attempt to undermine the trial judge's ruling to defendant's prejudice, it continued, was "so offensive to the sound administration of justice that only a new trial can effectively prevent such assaults on the integrity of the tribunal."

Accordingly, the court set aside the conviction and ordered a new trial. *State v. Ubaldi*, 462 A.2d 1001 (1983), 20 CLB 170.

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§ 14.195 —Defense counsel's "opening the door"

Alabama Defendant, charged with committing murder during a robbery, argued on appeal that the prosecutor's remarks on summation concerning the defense's failure to call a certain witness were improper and required a reversal.

At trial, it was established that the victim's wallet was found in a wooded area, not far from where the body was subsequently discovered, by the "missing" witness, Pou. Pou, a prison inmate serving in a work detail on the adjacent road, gave the wallet to authorities. The wallet contained no cash when the authorities received it. Neither side called Pou as a witness.

Defendant admitted having an altercation with the victim and claimed self-defense; after realizing that he had killed the victim, he claimed to have panicked and thrown the victim's wallet, containing identification, away without having removed any money.

On summation, defense counsel made much of the fact that the wallet was found by Pou, a convicted thief, and found by Pou, a convicted thief, and argued that Pou could have taken the victim's money. The prosecutor responded, in his closing argument, that Pou was in the county jail and could have been called by defendant.

On appeal, the Alabama Court of Criminal Appeals acknowledged the general rule that "one party may not comment unfavorably on the other party's failure to produce a witness supposedly favorable to the party if the witness is equally available . . . or accessible to both sides. Here, however, the court found that defense counsel's references to Pou "opened the door to any argument by the district attorney concerning Pou." Accordingly, it decided, the prosecutor's argument was not improper. *Helton v. State*, 433 So. 2d 1186 (Crim. App. 1983), 20 CLB 179.

15. JURY SELECTION

§ 15.20 Capital cases

Texas Defendant was convicted of murder committed during the course of a robbery and sentenced to death. The trial judge

refused to allow defense to question a prospective juror before granting prosecuting attorney's challenge for cause. Questioned first by the prosecutor and then by the judge about whether he would be willing to find a person guilty of a crime calling for the death penalty, juror vacillated in his answers before giving the answer that led to his being excused. Defendant appealed trial judge's refusal to allow defense counsel to question the juror.

The conviction was reversed and the case remanded. The juror should not have been excused before defense could question him unless he had already stated unequivocally that regardless of the evidence he would vote for a verdict that would not result in the death penalty being imposed. *Perillo v. State*, 656 S.W.2d 78 (Crim. App. 1983), 20 CLB 261.

INSTRUCTION

§ 15.120 Duty to charge on defendant's theory of defense

Rhode Island Defendant was found guilty in the beating death of his female companion. He had found her naked and drunk on the bathroom floor after a co-worker of his had left their apartment, and reached the conclusion—unsubstantiated—that she had had sex with the co-worker. Evidence established that the fatal beating occurred at least several hours after he found and first beat her, and probably took place nearly a day later. He had beaten the victim on other occasions. The trial judge instructed the jury only on first- and second-degree murder and on manslaughter. Defendant appealed, arguing, *inter alia*, that the trial judge was required to instruct the jury on voluntary manslaughter, as a lesser included offense.

The conviction for second-degree murder was affirmed. Voluntary manslaughter, under the common-law definition, is "an unintentional homicide without malice aforethought in the heat of passion as a result of adequate provocation." The killing in this case occurred after defendant had time to cool off and there was no evidence of a legally adequate cause. Since the evidence did not support a verdict of voluntary manslaughter, defendant was not entitled to an instruction on it. *State v. Conway*, 463 A.2d 1319 (1983), 20 CLB 263.

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§ 15.215 Prejudicial comments by trial judge during charge

California Defendant was convicted of the first-degree murder of two individuals. He was paid \$4,000 to commit the murders. Before the jury met to consider whether defendant should receive life imprisonment or a death sentence, the court instructed them: "As jurors, you must not be influenced by pity for a defendant or by prejudice against him. You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."

After defendant received the death penalty, the state public defender appealed the sentence on his behalf, arguing that the instruction to the jury not to be swayed by sympathy was improper.

The penalty was reversed by the California Supreme Court and a new penalty trial ordered. The court cited its opinion in *People v. Robertson*, 655 P.2d 279 (1982), that "in a capital case the defendant is constitutionally entitled to have the sentencing body consider any 'sympathy factor' raised by the evidence before it." Despite the aggravating factors in the crime, defendant did present jury with a number of sympathy factors that might possibly have influenced a properly instructed jury to clemency. *People v. Easley*, 196 Cal. Rptr. 309 (1983), 20 CLB 269.

Minnesota Defendant was convicted of attempted second-degree (intentional) murder and of assault in the first degree in the shooting of a friend and of another victim. In instructing the jury on the attempt charges, the judge explained the meaning of taking a "substantial step" by citing the contrasting examples of someone who thinks about shooting someone but stays at home and someone who, having thought about shooting someone, goes to that person's house to look for him. Defendant appealed, arguing that this example had the effect of directing a verdict on the issue of attempt.

The conviction was affirmed. There is a danger in using an example that fits too closely. However, even if an error was committed, it was not prejudicial, since the example did not deal with intent, which was the real issue, but only with whether defendant took a substantial step toward killing the victim, which was not

an issue. *State v. Williams*, 337 N.W.2d 689 (1983), 20 CLB 268.

§ 15.235 Supplemental instructions

West Virginia Defendant was convicted of being an accessory before the fact to the delivery of marijuana. At trial, it was established that he furnished two others with marijuana which they then sold to an undercover agent.

Defendant contended on appeal that he was prejudiced by the trial court's jury instruction that "in drug-related-offenses the infiltration of drug operations and limited participation in their unlawful practices by law enforcement personnel is a recognized and permissible means of detection and apprehension."

The West Virginia Supreme Court of Appeals disagreed with defendant and affirmed his conviction, noting that the instruction did not portray defendant as a member of a "drug operation" nor did it constitute a personal attack on his character; rather, it merely explained the undercover agent's role in the police investigation, said the court, an explanation to which the state was entitled. *State v. Dameron*, 304 S.E.2d 339 (1983), 20 CLB 178.

VERDICT

§ 15.320 Requirement of unanimity

Wisconsin Defendant was charged with one count of sexual assault. At trial, the complainant testified that, over the course of several hours, defendant and another forced her to engage in six separate acts of sexual intercourse. The jury found defendant guilty as charged; thereafter, defendant moved for a new trial on the ground, *inter alia*, that his right to a unanimous verdict was violated because the jury was not instructed that it must unanimously agree on the specific criminal act committed by defendant. The trial court disagreed, holding that a single criminal act was involved. That decision was reversed by an intermediate appellate court.

On the state's appeal, the Wisconsin Supreme Court reversed and reinstated the conviction, holding that the acts committed were part of a continuous criminal transaction and properly chargeable as one offense. Even though evidence of dif-

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ferent acts was introduced, it continued, "the jury did not have to be unanimous as to which specific act the defendant committed in order to convict the defendant, since the acts were conceptually similar." *State v. Lomagro*, 335 N.W.2d 583 (1983), 20 CLB 169.

17. SENTENCING AND PUNISHMENT SENTENCING

§ 17.50 Invalid conditions

Louisiana As a result of a plea bargain, defendant pled guilty to aggravated battery, a felony. The trial judge sentenced defendant to eight years imprisonment at hard labor. However the judge further ordered that two of the eight years be suspended, conditioned upon defendant's making restitution to the victim in the amount of \$6,215 within two years of the date of imposition of sentence. Defendant appealed, contending among other things that the sentence was illegal.

The Louisiana Supreme Court concluded that when a trial judge decides to sentence a defendant to a term of imprisonment in the state penitentiary without suspending the sentence, the judge cannot control the length of the period of actual incarceration. After analyzing the language of the relevant articles of the state code, the court found a legislative choice to permit this sort of "split sentence" only in misdemeanor, but not in felony cases. *State v. Patterson*, 442 So. 2d 442 (1983), 20 CLB 472.

§ 17.65 Re-sentencing

Rhode Island Defendants challenged the imposition of consecutive sentences as a result of revocation of their probationary status and removal of suspension from sentences previously imposed. Neither defendant challenged the adjudication of violation of his probationary status.

The Rhode Island Supreme Court remanded the cases with directions to enter judgments providing that all sentences executed upon both defendants shall be served concurrently where justices who imposed suspended sentences did not expressly provide that the period of probation or suspended portion of sentence, if executed, should be served consecutively. When two or more sentences to be served

in the same institution are imposed at the same time, such sentences run concurrently unless expressly ordered otherwise. (*Pellica v. Sharkey*, 292 A.2d 862 (1972).) Any distinction based upon the fact that different judges imposed these suspended sentences for different charges at different times had no persuasive effect. *State v. Studman*, 468 A.2d 918 (1983), 20 CLB 472.

§ 17.67 Reduction of sentence

Arkansas Defendant was convicted of murder. During the penalty phase of the trial, the State presented evidence of two other violent crimes allegedly committed by the defendant, for which he had not been tried. The judge allowed the jury to consider the evidence for one of the crimes in which a police officer's testimony linked defendant to the crime based on a witness identification that the witness himself denied. The evidence presented to the jury regarding the second crime was so insubstantial that the judge instructed the jury to disregard it. The defense requested a continuance to prepare a defense to the unexpected charges; it was denied. Arkansas law allows the state to offer evidence of the commission of other violent crimes during the penalty phase of capital murder cases to show aggravating circumstances. In 1977, the legislature deliberately deleted the restriction of such evidence to crimes for which the defendant had been convicted. The defendant was sentenced to the death penalty, and he appealed.

The Arkansas Supreme Court reduced the penalty to life without parole. When the state attempts to prove another unrelated crime during the penalty phase, without having evidence of a conviction, the trial court must prevent prejudicial evidence from reaching the jury. Evidence that utterly fails in its burden of proof, as here, creates prejudice that cannot be removed. Further, the defense must be granted the opportunity to present rebutting evidence. *Miller v. State*, 660 S.W.2d 163 (1983), 20 CLB 476.

PUNISHMENT

§ 17.125 Multiple punishment—in general

Kentucky Defendant was convicted of four counts of receiving stolen cattle and

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sentenced to four consecutive terms of five years each. The cattle were stolen from four different owners on different occasions. Defendant contended that he should have been charged with one count rather than four, since the cattle were all discovered in his possession at one time, and there was no proof that he obtained them on separate occasions.

Defendant's conviction was affirmed. The purpose of the statute in question is to protect owners, not to punish a continuous course of conduct. The fact that the cattle were stolen on separate occasions, together with evidence that defendant purchased cattle on at least four separate dates, was sufficient to permit jury's finding that he was guilty on four separate counts of receiving or retaining stolen property. *Hensley v. Commonwealth*, 655 S.W.2d 471 (Ky. 1983), 20 CLB 261.

Minnesota Defendant pled guilty to five crimes requiring imposition of minimum terms of three years pursuant to state statute. One conviction was for the aggravated robbery of a man. One conviction was for assaulting another man with a dangerous weapon. The other three convictions were for the aggravated robbery of three female residents of a house. The trial court, acting pursuant to state sentencing guidelines, sentenced defendant to five separate fifty-four-month sentences, one per victim, and made four of the five sentences run consecutively. This gave defendant an aggregate sentence of 216 months. On appeal, defendant argued that his sentence violated the guidelines and also unfairly exaggerated the criminality of his conduct.

The Minnesota Supreme Court affirmed and held that the sentence of 216 months was proper under prior cases interpreting and applying the guidelines and the so-called multiple-victim exception to the state statutes. *State v. Kennedy*, 342 N.W.2d 631 (1984), 20 CLB 477.

Virginia Defendant was convicted of three counts of brandishing and pointing a firearm, and sentenced to sixty days in jail on each count, for having drawn a pistol on three men with whom he had been arguing. Defendant appealed on the ground that his sentencing on three counts for a single act violated the constitutional prohibition against double jeopardy.

The court affirmed the multiple sentences. Following the Supreme Court decision in *Missouri v. Hunter*, 103 S. Ct. 673 (1983), it held that the controlling factor in determining multiple punishments for a single act is legislative intent. It looked to the wording of the relevant statute, which prohibited pointing or brandishing a firearm "in such a manner as to reasonably induce fear in the mind of another," and concluded that the intent of the statute was to prohibit a crime against the person of the victim in whom the fear is induced. There was no doubt that the three victims were frightened by the one act, since all three backed away. *Kelsoe v. Commonwealth*, 308 So. 2d 104 (1983), 20 CLB 266.

18. APPEAL AND ERROR

§ 18.00 Right to appeal

Wisconsin Defendant entered a guilty plea to a burglary charge, after a pretrial ruling that he could not offer psychiatric testimony in support of his intoxication defense. A condition of the plea bargain among defendant, the prosecutor, and the court was that defendant preserved the right to challenge the ruling on appeal. The intermediate appellate court, however, refused to review the exclusion of proffered evidence, relying on the general principle that voluntary entry of a guilty plea waives all nonjurisdictional defects. Defendant conceded that, ordinarily, appellate review of his claim would have been precluded but asserted that "review may be preserved when the plea of guilty is conditioned upon the right to assert the question on appeal and there is agreement by the prosecutor and acceptance of the plea by the trial judge."

The Wisconsin Supreme Court, after a full review of the rationale for the "guilty-plea waiver" rule, also concluded that it should be applied "even though a defendant expressly states his intent not to waive certain issues on appeal and makes that intention a condition of his plea and even though the prosecutor and the judge acquiesce in that intention."

As a matter of public policy, it reasoned, the courts should not give effect to an agreement by the parties conditioning a guilty plea upon the preservation of appel-

late rights. Exceptions to the guilty-plea waiver rule, it declared, should only be as provided by statute, i.e., only to a defendant's right to appeal from denial of an order of suppression.

Here, however, defendant pled guilty believing that he was entitled to appellate review; accordingly, his plea was neither knowing nor voluntary. Therefore, it remanded to give defendant an opportunity to withdraw his plea and stand trial on the charges. *State v. Reikkoff*, 332 N.W.2d 744 (1983), 20 CLB 71.

§ 18.20 Waiver of right to appeal

Indiana In trial for murder, defense counsel objected to two remarks made by prosecutor, and stated his reasons for objecting. When his objections were overruled, he did not move for a mistrial or ask that the jury be admonished to disregard the comments. The two remarks, and a third remark to which no objection was raised at trial, were part of the grounds on which defendant appealed his conviction.

The conviction was affirmed. The court found objections to arguments by prosecutor to be similar to objections to a question that has been asked and answered, where a motion to strike the answer and admonish the jury is required to preserve the right of review. The correct procedure in the case of improper argument is to request an admonishment; then, if the admonishment was not sufficient to cure the error, to move for a mistrial. This procedure should have been followed, even though the fact that the court overruled those objections that counsel raised strongly indicated that motions for admonishment or mistrial would also have been overruled. *Dresser v. State*, 454 N.E.2d 406 (1983), 20 CLB 264.

§ 18.45 Right to appeal on full record

Nebraska Defendant was convicted of operating a motor vehicle under the influence of alcohol. Defendant was sentenced to six months in prison and his operator's license was revoked for life. Defendant appealed, alleging that the sentence was excessive due to enhancement because of prior convictions, and in particular alleging that the statute did not require a mandatory permanent revocation of defendant's operator's license.

The Nebraska Supreme Court reversed and remanded where there were no certified records of prior convictions or any evidence to show whether defendant was represented by counsel and waived such representation. The court recognized that defendant did not assign as error the issues concerning defendant's plea, the absence of proof of prior convictions, or the deprivation of the opportunity to review such convictions and make objections; however, the court reserved the right to note and correct plain error which appears on the face of the incomplete record, in furtherance of the interests of substantial justice. *State v. Prichard*, 339 N.W.2d 748 (1983), 20 CLB 386.

§ 18.60 Jurisdiction

§ 18.66 —Belated appeals

Indiana Defendant was convicted of rape and other crimes on December 19, 1978. His motion to appeal was timely filed on March 16, 1979, but the court was informed by the sheriff on April 6, 1979 that defendant had escaped from jail and his whereabouts were unknown. On April 11, 1979, at the hearing on defendant's motion, the trial court granted the State's motion to dismiss on the ground that defendant had deliberately removed himself from the jurisdiction of the court and therefore had no standing to appeal. Defendant was recaptured and returned to jail two years later on June 3, 1982 defendant filed a petition for a belated appeal that was denied. Defendant appealed the denial of his petition for belated appeal because he did not knowingly waive his right to a direct appeal of his original convictions, and it was not his fault that the original motion to correct errors was not ruled on.

The Indiana Supreme Court affirmed the judgment of the trial court. A defendant who has escaped and is recaptured before the time limit for bringing his appeal had expired is not entitled to a belated appeal because the act of escaping was a voluntary act, notwithstanding defendant's contention that he did not know that if he escaped and remained a fugitive during the time designated for perfecting his appeal he would lose his right to appeal. *Prater v. State*, 459 N.E.2d 39 (1984), 20 CLB 471.

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19. PROBATION, PAROLE, AND PARDON

PROBATION

§ 19.10 Revocation of probation

Arkansas Defendant was placed on probation after pleading guilty to two felonies in Arkansas; subsequently, a petition to revoke his probation was filed, alleging that he had not reported to his probation officer. When defendant failed to appear at the hearing, an arrest warrant was issued.

Defendant was thereafter convicted on another charge in California and sentenced to two years' imprisonment. A detainer, based on the outstanding Arkansas warrant, was placed on him. He then requested a final disposition of the alleged probation violation under the Interstate Agreement on Detainers Act, to which both Arkansas and California are signatories.

His request for extradition and trial was denied, and he was not returned to Arkansas for a hearing until eight months had passed. He then moved to dismiss the petition, alleging that the Interstate Agreement requires the State to dispose of the complaint against him within 180 days of his request for final disposition. The hearing court denied defendant's dismissal motion, finding that the underlying felony charges had already been tried and that a probation revocation proceeding is not within the provision of the Interstate Agreement.

On appeal, the Arkansas Supreme Court affirmed, finding that the Interstate Agreement applied only to detainees lodged against a prisoner that are based upon untried indictments, informations, or complaints. The probation revocation proceeding was instituted against defendant for failing to report to his probation officer and, as defendant had been convicted of the underlying felonies and the probation violation did not involve commission of a new crime, "there was nothing 'untried' within the meaning of the statute."

The court concluded that "a charge of violation of probation, absent an allegation of the commission of an indictable offense, is not an 'untried indictment, information,

or complaint' within the scope and meaning of the Interstate Agreement on Detainers Act." *Padilla v. State*, 64 S.W.2d 797 (1983), 20 CLB 74.

§ 19.30 —Procedure

California Defendant was on probation for offenses related to the sale and possession of drugs. He was required to supply a urine sample to his probation officer. When tested, the sample showed traces of PCP, and a hearing was set for revocation of probation. Defense sought to inspect the urine sample before the hearing, but the sample had been discarded. It was the practice of the laboratory not to keep positive samples beyond three months unless a special request had been made. A toxicologist testified that a retest might have been useful, since there was "a lot of incompetence in this work." Defendant was found to be in violation of probation, and he appealed.

The court reversed the revocation of parole since, it held, the government had an obligation to preserve and disclose the test sample. The practice of preserving the sample for three months was inadequate; the system "fail[ed] to employ rigorous and systematic procedures designed to preserve material evidence for the hearing in which its results are introduced." The toxicologist's testimony as to the possibility of incompetence established that the evidence might possibly have supported defendant's claim of innocence and thus was material. *People v. Moore*, 666 P.2d 419 (1983), 20 CLB 387.

21. ANCILLARY PROCEEDINGS

EXTRADITION PROCEEDINGS

§ 21.20 Extradition proceedings—requirements

Arkansas *Padilla v. State*, 648 S.W.2d 797 (1983). Discussed at § 19.10 *supra*.

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PART III—FEDERAL CRIMES

24. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 24.15 Bank-related crimes generally

Court of Appeals, 1st Cir. After defendant was convicted in the district court of knowingly receiving stolen property, he appealed on the ground that he had been improperly prosecuted under 18 U.S.C. § 641.

The First Circuit affirmed, holding that, for purposes of the receiving stolen property statute, two Social Security checks were "things of value of the United States" upon which conviction could be premised. The court thus rejected the defense argument that the statute was inapplicable because the United States might not have been liable for loss caused by theft and the resulting fraud. *United States v. Santiago*, 729 F.2d 38 (1984), 20 CLB 465.

Court of Appeals, 4th Cir. The government appealed from an order of the district court vacating its prior ruling finding defendant guilty of misapplication of bank funds.

The Fourth Circuit affirmed, holding that since the check presented to the bank's board of directors to persuade the board to extend a new loan to a bank customer was worthless paper, no misapplication of funds took place since the bank gave nothing of value for the check. The court further ruled that the defendant's misrepresentation of the circumstances surrounding the check to obtain board approval did not constitute value from the bank to the maker of the check. *United States v. Kellerman*, 729 F.2d 281 (1984), 20 CLB 467.

§ 24.20 Bank robbery

U.S. Supreme Court After defendant was convicted in the district court of violating the Bank Robbery Act, the Court of Appeals for the Fifth Circuit reversed, but that court sitting en banc ultimately affirmed the conviction.

The Supreme Court affirmed, holding that the Bank Robbery Act was not limited to common-law larceny, but also proscribed the crime of obtaining money under false pretenses. The Court reasoned that

the congressional purpose was to protect banks from those who wished to steal banks' assets, even though no force was used in doing so. *Bell v. United States*, 103 S. Ct. 2398 (1983), 20 CLB 60.

§ 24.25 Bribery

U.S. Supreme Court After defendants were convicted in the district court of violating the federal bribery statute, they appealed on the ground that they were improperly prosecuted under the statute, and the court of appeals affirmed.

The Supreme Court affirmed, holding that executives of a private nonprofit corporation having operational responsibility for the administration of a federal housing grant program were "public officials" within the meaning of the federal bribery statute. The Court explained that while the mere presence of some federal assistance does not bring a local organization and its employees within the jurisdiction of the statute, an individual is a "public official" if he possesses some degree of official responsibility for carrying out a federal program or policy. *Dixon v. United States*, 104 S. Ct. 1172 (1984), 20 CLB 462.

Court of Appeals, 2d Cir. After defendants were convicted in the district court under RICO statute, they appealed on the ground that they had not violated the New York felony statute prohibiting sports bribery that had been used as a predicate offense under the RICO statute.

The Second Circuit reversed, holding that defendants had not violated the sports bribery statute since they had not asked a groom to refrain from giving his best efforts. The court explained that while defendants had sought the help of a licensed groom in drugging horses, such action was not a violation of the statute in question, which makes it a crime when someone "confers, offers or agrees to confer any benefit upon a sports participant with an intent to influence him not to give his best efforts. . . ." Consequently, the statute could not be used against the defendants as a basis for the RICO statute. *United States v. Malizia*, 720 F.2d 744 (1983), 20 CLB 256.

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§ 24.45 Conspiracy

Court of Appeals, 2d Cir. Defendant was convicted in the district court of drug conspiracy, and she appealed on the ground that the government's evidence was legally insufficient.

The Second Circuit reversed, holding that the evidence that defendant had been living in an apartment that was used as a "cutting mill" and that defendant was found in the same room as the narcotics was insufficient to sustain her conviction for conspiracy to distribute narcotics. The court noted that the evidence showed that defendant was recently arrived from Puerto Rico, accompanied by a child of tender years, and there was no evidence that she had any alternative living space available to her. *United States v. Soto*, 716 F.2d 989 (1983), 20 CLB 168.

§ 24.55 Counterfeiting

Court of Appeals, 2d Cir. After defendants were convicted in the district court on conspiracy to commit bank and wire fraud and conspiracy to use counterfeit credit cards, they appealed on the ground, *inter alia*, that there was no evidence that the defendants intended to affect interstate commerce.

The Second Circuit affirmed, holding that the interstate commerce and \$1,000 monetary threshold elements of the counterfeit credit card statute, 15 U.S.C. § 1644(a), are solely jurisdictional and do not relate to the element of intent. The court reasoned that it was the agreement that the particular cards whose credit limits exceeded \$1,000 would ultimately be used in transactions affecting interstate commerce that gave rise to a sufficient threat to interstate transactions as to trigger federal jurisdiction. *United States v. DeBiasi*, 712 F.2d 785 (1983), 20 CLB 63.

§ 24.135 Hobbs Act

Court of Appeals, 6th Cir. After his first conviction was reversed because certain evidence was improperly admitted at trial, defendant was convicted of obstructing interstate commerce by extortion in violation of the Hobbs Act, and he appealed.

The Sixth Circuit affirmed, holding that defendant's act of coercing his employees into an illegal agreement that required them to pay for pension contributions that defendant should have paid was subject to

prosecution under the Hobbs Act, and such act was not within the legitimate labor negotiation activity which was excluded from Hobbs Act prosecution. The court thus agreed with the government's view that defendant's practice constituted a wrongful means to achieve a wrongful objective. *United States v. Cusmano*, 729 F.2d 380 (1984), 20 CLB 468.

§ 24.160 Interstate racketeering

Court of Appeals, 3d Cir. After defendants were convicted in district court on a RICO count, they appealed on the ground that the description of the RICO "enterprise" in the indictment was improper.

The Third Circuit affirmed, holding that the indictment's description of RICO "enterprise" as a "group of individuals and a corporation associated in fact" conformed to the statutory definition. The court explained that the evidence at trial showed that the individuals and the corporation defined as the "enterprise" undertook construction projects for enrichment of its members, and that to promote the projects, the defendants committed bribery as well as mail and wire fraud, thus supporting the finding of a single conspiracy. *United States v. Aimone*, 715 F.2d 822 (1983), 20 CLB 168.

§ 24.188 Kidnapping

Court of Appeals, 4th Cir. *United States v. Hughes*, 716 F.2d 234 (1983). Discussed at § 36.110 *infra*.

§ 24.190 Mail fraud

Court of Appeals, 2d Cir. After defendants were convicted in the district court of conspiracy, mail fraud, and related offenses, they appealed on the ground that the mailing of bank statements was an insufficient basis for invocation of the mail fraud statute.

The Second Circuit affirmed, holding that where the mailing of bank statements was crucial to the operation of the check-kiting scheme to enable operators to know the speed at which the victim banks credited deposits and cleared checks and to make periodic reviews of their accounts for errors, the mailing of monthly statements satisfied the mailing requirement of the mail fraud statute. The court thus found that the mailing of the bank statements was sufficient proof that the defen-

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dants had caused a mailing "for the purpose of executing" a fraudulent scheme within the scope of 18 U.S.C. § 1341. *United States v. Pick*, 724 F.2d 297 (1983), 20 CLB 376.

Court of Appeals, 9th Cir. After defendants were convicted of various offenses in connection with sale/leaseback transactions in which investors would buy equipment from one company and lease it back to a trucking company, they appealed.

The Ninth Circuit affirmed, holding that defendants could be convicted of mail fraud where they caused a bank to mail notices of lease payments after agreements were entered into which reassured the investors that all was well, thus discouraging them from investigating the fraud. *United States v. Jones*, 712 F.2d 1316 (1983), 20 CLB 64.

§ 24.220 Perjury

§ 24.225 —Grand jury testimony

Court of Appeals, 1st Cir. On appeal from a conviction of perjury in the district court based on false testimony given to a grand jury investigating a fire, defendant argued that he had properly recanted his testimony as to his whereabouts at the time of the fire.

The First Circuit affirmed the conviction, holding that defendant's statement to a federal agent, after he had testified in the grand jury, that he "might" have been in error with respect to testimony as to his whereabouts at the time of the fire was not an effective recantation. The court observed that defendant's statements did not constitute a sufficiently specific and clear admission that his prior testimony was false so as to preclude prosecution for perjury. *United States v. Goguen*, 723 F.2d 1012 (1983), 20 CLB 374.

§ 24.255 Travel Act

Court of Appeals, 5th Cir. After defendants were convicted in the district court of aiding and abetting one another in using and causing to be used a facility in interstate commerce with intent to carry on a bribery scheme, they appealed.

The Fifth Circuit affirmed the convictions, holding that an interstate telephone call made by defendant requesting funds

for bribery of a city councilman was sufficient to invoke Travel Act jurisdiction over defendants. The court reasoned that the arrangement for the actual payment of the bribe made easier the commission of the scheme, and the telephone call to obtain the funds actually benefited defendant's plans to arrange payment for the city councilman and thus facilitated the unlawful bribery. *United States v. Garrett*, 716 F.2d 257 (1983), 20 CLB 166.

§ 24.265 Wire fraud

Court of Appeals, 2d Cir. After defendants were convicted in the district court of a scheme to defraud the state of tax revenues in violation of the wire fraud statute, they appealed on the ground that the telephone calls were insufficiently connected with the wire fraud.

The Second Circuit reversed the conviction of two of the defendants on two counts, holding that there was no nexus shown between the telephone calls and the scheme to defraud. The court noted that the telephone numbers in question were not listed in any of the defendants' names, and there was no evidence linking those calls to any of the defendants, either in connection with any bank deposits or the placing of any cigarette order. *United States v. De Fiore*, 720 F.2d 757 (1983), 20 CLB 256.

Court of Appeals, 2d Cir. After defendant, a freight forwarder, was convicted in the district court of one count of conspiracy to defraud the Agency for International Development (AID) and the World Bank and four counts of wire fraud, defendant appealed on the ground that the evidence was insufficient to support his conviction.

The Second Circuit affirmed the conviction, holding that a wire fraud prosecution may be premised on the theory that a freight forwarder breaches his fiduciary duties where, in order to take for himself a portion of the freight charges, he causes his principal to breach an exclusive dealing agreement and conceals favorable freight rates. The court also found that the evidence was sufficient where the defendant caused AID to approve payment of freight charges of \$158,000 rather than \$106,000. *United States v. Ventura*, 724 F.2d 305 (1983), 20 CLB 376.

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25. CAPACITY

§ 25.10 Insanity

U.S. Supreme Court Criminal defendant who was acquitted by reason of insanity was denied his request for release from a mental hospital by the Superior Court of the District of Columbia, and the Court of Appeals for the District of Columbia Circuit affirmed.

The Supreme Court affirmed, holding that where a criminal defendant established by a preponderance of the evidence that he was not guilty by reason of insanity, the due process clause permitted the government to confine him in a mental institution until such time as he had regained his sanity or was no longer a danger to himself or society. *Jones v. United States*, 103 S. Ct. 3043 (1983), 20 CLB 161.

27. DEFENSES

§ 27.15 Entrapment

Court of Appeals, 2d Cir. After defendant was convicted of bribery and related charges arising from the "Abscam" investigation, he appealed on the ground that he was entrapped.

The Second Circuit affirmed, holding that the evidence did not show entrapment

or outrageous government conduct. The court reasoned that where no agent of the government suggested to defendant that a condition for earning a commission on a casino project was his willingness to participate in bribing a congressman, entrapment was not available as a defense. The court explained that government agents had simply invited him to continue locating willing congressmen without offering any inducement other than what share of the bribe payments he was able to obtain from another individual. *United States v. Silvestri*, 719 F.2d 577 (1983), 20 CLB 259.

Court of Appeals, 3d Cir. After defendant was convicted of conspiracy to violate the provisions of the racketeering act and Hobbs Act, the district court granted his motion for acquittal, and the government appealed. The court of appeals reversed and ordered reinstatement of the jury verdicts. Defendant then appealed after sentencing.

The Third Circuit affirmed, holding that although the entrapment charge was erroneous since it improperly required defendants to show some evidence of inducement, either by introducing their own proof or by reference to the government's evidence, the error was not reversible in view of the overwhelming evidence of defendant's predisposition. *United States v. Jannotti*, 729 F.2d 213 (1984), 20 CLB 467.

PART IV—FEDERAL PROCEDURES

29. PRELIMINARY PROCEEDINGS

§ 29.00 Grand jury proceedings

U.S. Supreme Court After the government moved for disclosure to civil division attorneys of grand jury material obtained during an investigation to determine whether taxpayers had criminally defrauded the United States, the district court granted access, but the Court of Appeals for the Ninth Circuit vacated and remanded.

The Supreme Court affirmed, holding that disclosure of grand jury materials to an attorney for the government is limited to use by those attorneys who conduct the criminal matters to which the materials pertain. The Court so found even though

civil division attorneys are within the class of "attorneys for the government" under the rule and access was sought in furtherance of governmental responsibilities. *United States v. Sells Eng'g, Inc.*, 103 S. Ct. 3133 (1983), 20 CLB 161.

U.S. Supreme Court After the government moved for disclosure of grand jury transcripts and documents to determine a grand jury target's civil income tax liability, the district court ordered partial disclosure, but the Court of Appeals for the Seventh Circuit reversed and remanded.

The Supreme Court affirmed, holding that the grand jury documents could not be released for the intended purpose since the civil tax audit was not "preliminary or in connection with a judicial proceeding"

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within the meaning of Rule 6(e) of the Federal Rules of Criminal Procedure. The Court reasoned that Rule 6(e) contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated, and it is not enough to show that some litigation may emerge from the matter in which the material is to be used. *United States v. Baggot*, 103 S. Ct. 3164 (1983), 20 CLB 161.

Court of Appeals, 2d Cir. After defendants were convicted in the district court on drug conspiracy charges, they appealed on the ground that the prosecutor's presentation before the grand jury required reversal.

The Second Circuit reversed, holding that the misconduct of the prosecutor, who presented extensive hearsay and double hearsay before the grand jury regarding one defendant's involvement in two murders, and whose accusations appeared to have been made in order to depict the defendants as bad persons, mandated dismissal of the indictment. *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983), 20 CLB 62.

§ 29.05 —Subpoenas

U.S. Supreme Court The owner of a sole proprietorship upon whom subpoenas had been served demanding production of certain business records filed a motion to quash the subpoenas. The district court granted the motion, and the Court of Appeals for the Third Circuit affirmed.

The Supreme Court affirmed in part and reversed in part, holding that while the contents of business records were not privileged, the act of producing the records was privileged and could not be compelled without a grant of use immunity. The Court reasoned that since the owner did not concede that the subpoenaed records actually existed or were in his possession, the act of producing the records might be incriminating. *United States v. John Doe*, 104 S. Ct. 1237 (1984), 20 CLB 462.

Court of Appeals, 2d Cir. Defendant, a pharmacist, was convicted in the district court of conspiracy to distribute and possess with intent to distribute a controlled substance. On appeal, he argued that the government had improperly been per-

mitted to introduce evidence seized pursuant to "forthwith" grand jury subpoenas.

The Second Circuit affirmed the conviction, holding that the government's use of subpoenas requiring production of the pharmacies' records "forthwith" while defendant was under arrest was entirely lawful. The court reasoned that the federal investigators had substantial reason to believe that the pharmacist was engaged unlawfully in distributing controlled substances, and they were motivated by reasonable and good-faith concerns that the pharmacist would attempt to tamper with evidence if given the opportunity. *United States v. Lartey*, 716 F.2d 955 (1983), 20 CLB 167.

§ 29.10 —Immunity

Court of Appeals, 3d Cir. After defendant was convicted in the district court of violating the antikickback statute, he appealed on the ground that the trial prosecutor had improperly used his grand jury testimony.

The Third Circuit remanded for further proceedings to determine whether the government violated defendant's use immunity by giving the prosecutor access to defendant's grand jury testimony relating to the charged offense. The court observed that if such were the case, defendant would not have been substantially in the same position as if he had not testified since the trial prosecutor would have then known his intended defense. The court suggested that the way to avoid this problem was to have a different trial attorney for the government who had no prior access to defendant's grand jury testimony. *United States v. Semkiw*, 712 F.2d 891 (1983), 20 CLB 63.

30. INDICTMENT AND INFORMATION

§ 30.00 In general

Court of Appeals, 2d Cir. Defendant was convicted in the district court of theft of mail matter and opening mail without authority. On appeal, he argued that the government should have been prevented from reprosecuting him after the complaint against him was dismissed.

The Second Circuit reversed the conviction and dismissed the complaint, holding

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that while the statute mandating dismissal of a complaint if no indictment or information is filed within thirty days does not create a presumption that dismissal will be with prejudice, the facts of this case warranted dismissal with prejudice. The court noted that the complaint was not dismissed until fifty-one days after defendant's arrest, defendant's conduct did not constitute a "serious" crime, and the prosecutor's negligence was the sole cause of the failure to comply with the Speedy Trial Act's time requirements. *United States v. Caparella*, 716 F.2d 976 (1983), 20 CLB 167.

31. PRETRIAL MOTIONS

§ 31.00 Sufficiency of indictment

§ 31.10 —Severance

Court of Appeals, 1st Cir. Two defendants were convicted in the district court of conspiracy and violating the Travel Act and, on appeal, they argued that they had been improperly joined at trial.

The First Circuit affirmed, holding that a conspiracy count can be a sufficient connecting link between co-defendants and multiple offenses that tip the balance in favor of joinder as long as the conspiracy count is added in good faith. The court noted that the determination of what constitutes a single series of acts or transactions under the misjoinder rule involves balancing the benefit to the government of trying together multiple defendants involved in related incidents against each defendant's right to have his own guilt considered separately. *United States v. Arruda*, 715 F.2d 671 (1983), 20 CLB 168.

32. DISCOVERY

§ 32.00 In general

Court of Appeals, 1st Cir. After defendants were convicted in the district court on charges arising out of an armed bank robbery, they appealed on the ground that the government's failure to turn evidence over to them prior to trial required reversal.

The First Circuit affirmed, holding that the government's failure to disclose in a timely manner footprint, fingerprint, and

handwriting reports in advance of trial did not warrant reversal of defendants' convictions. The court reasoned that defendants were not prejudiced since they received the reports during the course of trial and used them in their defense. The court further observed that it did not appear that their timely disclosure would have resulted in a different defense strategy, and defendants' general discovery requests failed to establish a *Brady* claim since the reports were not obviously exculpatory in nature. *United States v. Hemmer*, 729 F.2d 10 (1984), 20 CLB 464.

Court of Appeals, 3d Cir. The district court precluded a key government witness from testifying at trial as a sanction against the government for its failure to turn over to defendant certain exculpatory evidence prior to trial and the government appealed.

The Third Circuit vacated the order and remanded, holding that absent prejudice to the defendant by the government's non-disclosure, the government's failure to disclose did not warrant precluding such witness from testifying. The court observed, however, that a prosecutor who intentionally fails to turn over exculpatory evidence to the defense violates standards of professional conduct and may be subject to disciplinary sanctions. *United States v. Starusko*, 729 F.2d 256 (1984), 20 CLB 467.

§ 32.10 —Statements of witnesses

Court of Appeals, 2d Cir. After defendant was convicted in the district court of armed robbery, he appealed on the ground that the government had failed to produce an exculpatory FBI report.

The Second Circuit remanded for further hearings, holding that the record was insufficient on the critical issue as to whether the failure to introduce the FBI report was the result of ineffective assistance of counsel or a *Brady* violation by the government. The court explained that exculpatory evidence is not "suppressed" if the defendant either knew or should have known of essential facts permitting him to take advantage of the evidence. *United States v. Torres*, 719 F.2d 549 (1983), 20 CLB 260.

Court of Appeals, 2d Cir. Defendants appealed from their convictions in the dis-

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strict court of various narcotics offenses on the ground that the *Brady* rule had been violated.

The Second Circuit affirmed, holding that failure to deliver certain exculpatory material promptly to the defendants did not warrant reversal. The court noted that there was no showing of prejudice since the evidence was, in fact, eventually produced during trial, and the defendants did not request a continuance nor recall witnesses for further examination. The court also observed that the trial court carefully scrutinized the possibility of prosecutory misconduct and struck the testimony of one witness when the government inadvertently failed to produce one of the witness's reports. *United States v. Mourad*, 729 F.2d 195 (1984), 20 CLB 466.

Court of Appeals, 5th Cir. State prisoner sought a writ of habeas corpus alleging that the prosecution had violated his rights at trial by failing to turn over to him exculpatory evidence available to it.

The Fifth Circuit reversed and remanded, holding that suppression of material favorable to the accused includes situations where the prosecution, although not soliciting false evidence, allows it to go uncorrected when it appears. The court thus found that an evidentiary hearing was needed to determine whether police records were suppressed or withheld by the prosecution and whether the prosecution failed to correct what it knew or should have known to be false or incorrect testimony of witnesses who identified the petitioner as a passenger of the getaway car. *Austin v. McKaskle*, 724 F.2d 1153 (1984), 20 CLB 378.

33. GUILTY PLEAS

§ 33.45 Involuntariness of plea

§ 33.55 —Promises

Court of Appeals, 5th Cir. After defendant was convicted in the district court of conspiracy to possess cocaine, he appealed on the ground that the prosecutor had violated the plea bargain agreement.

The Fifth Circuit vacated and remanded on other grounds, holding that the provision of the plea bargain agreement that the prosecutor would "stand mute" at sentencing was not violated by the pros-

ecutor's turning over its files to the probation department at the department's request. The court reasoned that the requirement that the prosecutor "stand mute" only required that "at the sentencing the government would not recommend anything one way or another." *United States v. Dickson*, 712 F.2d 952 (1983), 20 CLB 63.

34. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 34.95 Identification evidence

Court of Appeals, 5th Cir. After defendant was convicted in the district court of bank robbery, he appealed on the ground that a fingerprint expert should have been appointed at trial.

The Fifth Circuit reversed and remanded, holding that where the government's case rests heavily on a theory most competently addressed by expert testimony, an indigent defendant must be afforded an opportunity to prepare and present his defense with the assistance of his own expert. The court noted that in this case, the testimony of two eyewitnesses was inconsistent and not entirely conclusive, three of the government's four remaining witnesses testified with regard to fingerprint evidence, and the assistance of an expert would have facilitated either defendant's showing that latent palm prints lifted from the crime scene were blurred or defendant's cross-examination of the government expert. *United States v. Patterson*, 724 F.2d 1128 (1984), 20 CLB 377.

§ 34.135 Privileged communications

Court of Appeals, 4th Cir. After defendant was convicted of bank robbery, he appealed on the ground that a statement he had made to his wife had been improperly admitted at trial.

The Fourth Circuit affirmed, holding that the trial court's erroneous admission of statements made in confidence by defendant was harmless. The court noted that while there was no evidence dispelling the presumption of confidentiality of communications between defendant and his wife, the trial court's error was harmless in light of the conclusive evidence upholding the conviction. *United States v.*

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Thompson, 716 F.2d 248 (1983), 20 CLB 166.

§ 34.150 Expert witness

U.S. Supreme Court After his conviction for capital murder in a Texas state court, defendant was sentenced to death following a sentencing hearing at which the state called two psychiatrists. The psychiatrists, in response to hypothetical questions, testified that there was a probability that defendant would commit further criminal acts of violence and would constitute a continuing threat to society. The district court denied his motion for habeas corpus, and the court of appeals denied his motion for a stay of execution of the death sentence.

The Supreme Court affirmed, holding that the jury should not be barred from hearing views of the state's psychiatrists along with the opposing views of defendant's doctors as to defendant's dangerousness. The Court further found that expert opinions, whether in the form of opinion based on hypothetical questions or otherwise, may be admitted even in cases involving the death penalty. *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983), 20 CLB 162.

§ 34.220 Hearsay evidence

Court of Appeals, 4th Cir. After defendant had been convicted of armed bank robbery, he appealed on the ground that a comment of a police officer had been improperly admitted against him.

The Fourth Circuit affirmed, holding that the admission in evidence of the spontaneous comment of the interviewing officer after defendant had told him he would plead guilty to one of the bank robbery statutes was proper since it fell within the contemporaneous response exceptions to the hearsay rule (Rule 803(1)). The response of the interviewing officer was to advise the defendant that "this was a lesser charge and that it carried a ten-year maximum penalty." *United States v. Hinton*, 719 F.2d 711 (1983), 20 CLB 260.

Court of Appeals, 4th Cir. After defendant was convicted in the district court of income tax evasion, he appealed on the ground that a memorandum from a deceased attorney had been improperly excluded at trial.

The Fourth Circuit affirmed, holding that the memorandum was not admissible under the residual exception to the hearsay rule because the testimony of an officer of the bank would have been more probative of the third party's possession of \$100,000 than was the memorandum of the deceased attorney. The court further found that the memorandum was not so probative of defendant's innocence as to give rise to a duty on the part of the government to turn it over to defendant. *United States v. Heyward*, 729 F.2d 297 (1984), 20 CLB 467.

§ 34.225 Admissions and confessions

§ 34.233 —Declarations against penal interest

Court of Appeals, 2d Cir. After defendants were convicted of mail fraud, conspiracy, and use of an explosive to destroy a commercial building owned by them, they appealed on the ground, *inter alia*, that evidence of "nodding" by the arsonist in response to questions had been improperly admitted against them.

The Second Circuit reversed in part and affirmed in part, holding that evidence of "nodding" of the injured arsonist's head in response to hospital questioning by a friend was admissible under the penal interest exception to the hearsay rule. The court reasoned that under Federal Rule of Evidence 804(b)(3), the questioned evidence could be introduced to establish that the owners of the building had participated in the arson since the circumstances tended to confirm its trustworthiness. *United States v. Katsougrakis*, 715 F.2d 769 (1983), 20 CLB 169.

§ 34.235 —Declarations of co-conspirators

Court of Appeals, 3th Cir. After defendants were convicted in the district court of federal drug violations, they appealed on the ground that the court failed to articulate its rationale for admitting hearsay statements in the absence of substantial independent evidence of a conspiracy as required by *United States v. James*, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

The Fifth Circuit affirmed in part and reversed on other grounds, holding that the trial judge's failure to specifically articulate his *James* findings as to the admis-

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sibility of hearsay statements did not constitute reversible error. The court of appeals noted that the *James* issue received "careful consideration," even though the judge had admitted the evidence "subject to later connections," since there had been independent evidence of the crime aside from the hearsay testimony. *United States v. Winship*, 724 F.2d 1116 (1984), 20 CLB 377.

WEIGHT AND SUFFICIENCY

§ 34.265 Sufficiency of evidence

§ 34.270 —Drug violations

Court of Appeals, 8th Cir. After defendants were convicted in the district court of conspiracy to possess marijuana with intent to distribute, they appealed on the ground that there was a fatal variance between the information and the proof at trial requiring reversal.

The Eleventh Circuit affirmed in part and reversed in part, holding that while the variance required reversal of the conspiracy conviction, the evidence was sufficient to sustain the conviction on the possession charge. The court observed that the evidence that defendants had a possessory interest in a large marijuana crop harvested on a particular farm was so strong that the conviction on that charge should be affirmed despite the variance. *United States v. Snider*, 720 F.2d 985 (1983), 20 CLB 258.

35. THE TRIAL

§ 35.20 Absence of defendant or counsel

Court of Appeals, 5th Cir. Defendant was convicted in the Texas district court of conspiracy to transport illegal aliens. On appeal, he argued that it was error for the trial court to have proceeded with the trial in his absence.

The Fifth Circuit reversed the conviction, holding that the trial court's decision to proceed with the trial in the defendant's absence, without further inquiry, was an abuse of the trial court's narrow discretion. The court commented that the later discovery that defendant was indeed a fugitive during his absence from trial would not excuse the failure of the trial court to make inquiry as to whether the

trial could soon be rescheduled with defendant in attendance. *United States v. Beltran-Nunez*, 716 F.2d 287 (1983), 20 CLB 166.

§ 35.95 Conduct of prosecutor

Court of Appeals, 7th Cir. After defendant was convicted in the district court of conspiracy to make a material false statement to a federally licensed firearms dealer, he appealed.

The Seventh Circuit affirmed, holding that the reading by a co-conspirator of his immunity agreement, which indicated he would be subject to prosecution if he testified falsely, was not plain error. The court also refused to apply the plain error doctrine whereby defendant argued that by stating in the opening argument that the co-conspirator would testify "truthfully," the prosecutor was improperly vouching for his credibility. *United States v. Ojukwa*, 712 F.2d 1192 (1983), 20 CLB 64.

§ 35.100 Discretion to prosecute

§ 35.105 —Improper questioning of witnesses

Court of Appeals, 2d Cir. After defendant was convicted in the district court of making extortionate extensions of credit and conspiracy, he appealed on the ground that the prosecutor had improperly questioned the victim on the stand.

The Second Circuit affirmed, holding that the questions and answers disclosing that the victim was afraid at the time of trial did not warrant reversal where the trial court struck the answer immediately and gave an appropriate curative instruction, and where proper evidence of the victim's fears during his dealings with defendant had previously been received. The court further found that neither the prosecution's reference to the defendant's alleged ties to organized crime nor admission of "other crimes" evidence gave rise to reversible error. *United States v. Gigante*, 729 F.2d 78 (1984), 20 CLB 465.

§ 35.110 —Comments made during summation

U.S. Supreme Court Defendants, convicted in the district court of kidnapping

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and transporting women across state lines for immoral purposes, appealed. The Court of Appeals for the Seventh Circuit reversed on the ground that the prosecutor's summation violated the defendants' Fifth Amendment rights; the prosecutor had commented that the defendants never challenged the actual occurrence of the kidnapping or the interstate transportation of the victims.

The Supreme Court reversed and remanded, holding that the court of appeals improperly avoided application of the harmless error doctrine by asserting its supervisory powers. The Court reasoned that the supervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless, such as the prosecutor's comments here. *United States v. Hastings*, 103 S. Ct. 1974 (1983), 20 CLB 59.

Court of Appeals, 3d Cir. After Pennsylvania state prisoner had been convicted of attempted burglary of a bank, he sought federal habeas relief on the grounds that the prosecutor's closing argument was improper.

The Third Circuit affirmed the district court's denial of relief, finding that it was not overreaching for the district attorney to ask the jury to draw the inference that the pro se defendant was talking about himself when he asked questions about the conduct of "the defendant" in the bank. The court commented that defendant could not properly reject the state's offer to provide counsel and then claim a constitutional deprivation because he tried his case "so stupidly." *Oliver v. Zimmerman*, 720 F.2d 766 (1983), 20 CLB 257.

Court of Appeals, 4th Cir. After defendants were convicted in the district court of conspiracy to distribute cocaine, they appealed on the ground that the prosecutor's comments in summation deprived them of a fair trial.

The Fourth Circuit affirmed the convictions, holding that while the prosecutor's conduct was "senseless," reversal was not required because of the trial court's admonitions and other circumstances of the trial. The court noted that the verbal exchanges between opposing counsel throughout the trial were heated, which prompted the prosecutor to say in rebuttal summation that he "hated" both defen-

dants and "what they're doing to our society." *United States v. Harrison*, 716 F.2d 1050 (1983), 20 CLB 168.

§ 35.115 —Comment on defendant's failure to testify

Court of Appeals, 3d Cir. After defendant was convicted for making false statements to the Immigration and Naturalization Service, defendant appealed on the ground that the prosecutor had improperly cross-examined a witness.

The Third Circuit affirmed, holding that while the trial court erred in allowing the government to cross-examine a defense witness about the invocation of her Fifth Amendment privilege against self-incrimination, such error was harmless where the witness's testimony was of minimal probative value as to the charges on which defendant was convicted and there was no likelihood that the jury would have associated the witness's claim of privilege with defendant's guilt. The court particularly noted that the witness's only testimony which was exculpatory was fully credited by the jury and resulted in an acquittal on the relevant charges. *Nezouy v. United States*, 723 F.2d 1120 (1983), 20 CLB 375.

36. THE JURY

SELECTION

§ 36.40 Exposure of jurors to prejudicial publicity

Court of Appeals, 1st Cir. Habeas corpus petitioner appealed from an order of the district court denying his writ, based upon the argument that he had been denied a fair trial by the trial court's handling of a newspaper report appearing on the second day of his trial reporting that he had been indicted for murder in three counties.

The First Circuit affirmed, holding that the Constitution does not require an individual voir dire of all jurors exposed to potentially prejudicial publicity. The court observed that the trial judge had questioned the jurors collectively and repeatedly emphasized to the jurors the importance of ignoring press accounts and of deciding the case solely on the basis of evidence presented at trial. *Jackson v. Amaral*, 729 F.2d 41 (1984), 20 CLB 465.

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INSTRUCTIONS

§ 36.85 Duty to charge on defendant's theory of defense

Court of Appeals, 2d Cir. After defendant was convicted of possession of a controlled substance, he appealed on the ground that the trial court was in error in its charge relating to the type of cocaine in possession of the defendant.

The Court of Appeals for the Second Circuit reversed, holding that the trial court erred in instructing the jury that D-cocaine was the chemical equivalent of L-cocaine, the only cocaine isomer regulated by federal statute. The court noted that there are eight cocaine isomers, only one of which is covered by the federal statute, and the jury could have reasonably determined that the substance was either L-cocaine or D-cocaine. *United States v. Ross*, 719 F.2d 615 (1983), 20 CLB 260.

§ 36.110 Intent and willfulness

Court of Appeals, 2d Cir. A New York State prisoner, who was convicted for manslaughter and felony murder, petitioned for a writ of habeas corpus, which was denied in the district court.

The Second Circuit affirmed, holding that petitioner's failure to object in the state criminal trial to a lesser included offense instruction waived his right to raise the claim in federal court that the trial court's failure to inform defense counsel that it would charge the lesser included offense prevented counsel from appropriately addressing such charge. *Edwards v. Jones*, 720 F.2d 751 (1983), 20 CLB 256.

Court of Appeals, 4th Cir. After defendant was convicted in the district court of kidnapping, he appealed on the ground that he did not have the requisite illegal intent prior to the interstate movement.

The Fourth Circuit affirmed, holding that there was no requirement under the kidnapping statute that the victim know the kidnapper's intentions before they travel interstate. The court thus found that by inducing the victim by misrepresentation to enter the vehicle and accompany the kidnapper, knowing that the victim's belief as to the purpose and destination was different from the kidnapper's actual

illicit purpose, defendant had fulfilled the "involuntariness of seizure and detention" requirement of the statute. *United States v. Hughes*, 716 F.2d 234 (1983), 20 CLB 165.

§ 36.150 Prejudicial comments by trial judge during charge

Court of Appeals, 1st Cir. Petitioner filed a writ of habeas corpus challenging the legality of the trial court's charge to the jury in a murder trial.

The First Circuit affirmed, holding that the jury instructions on intent to kill and malice did not contain constitutional error even though the judge included phrases such as "if you accept that story." The court found that while such phrases were not particularly well chosen, they were not constitutional error in view of the overall charge, which was not intended to imply denigration or disbelief of a defendant's testimony. *Lannon v. Hogan*, 719 F.2d 518 (1983), 20 CLB 259.

DELIBERATION

§ 36.195 Other authorized or improper conduct

U.S. Supreme Court Defendant was one of six inmates involved in a 1971 San Quentin prison escape that resulted in the death of three prisoners and three correction officers. During the course of the seventeen-month-long trial, evidence was introduced of an unrelated murder of which one of the jurors had some knowledge. Upon hearing this evidence, the juror twice went to the judge's chambers to tell him of her personal acquaintance with the murder victim, but assured him that her disposition of the case would not be affected. The judge made no record of the conversations, and he informed neither the defendants nor their counsel about them. The defendant was convicted of murder and the California Court of Appeal affirmed. A writ of habeas corpus was then granted in the district court, and the Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court vacated and remanded, holding that unrecorded ex parte communications between a trial judge and a juror can be harmless error. The Court reasoned that the prejudicial effect of the

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failure to disclose an *ex parte* communication between judge and juror can normally be determined by a post-trial hearing. *Rushen v. Spain*, 104 S. Ct. 453 (1983), 20 CLB 255.

37. POST-TRIAL MOTIONS

§ 37.35 Federal habeas corpus

U.S. Supreme Court After defendant was convicted in Alaska state court, his petition for habeas corpus relief was denied in the district court after he claimed that certain evidence should have been suppressed. The court of appeals affirmed, but defendant sought bail on the basis that the state did not oppose his release on bail.

The Supreme Court held that the application should be denied despite the fact that the state did not oppose it, finding that the possibility of the Supreme Court granting certiorari to review the judgment of the court of appeals approached zero. The Court commented that it is not part of the function of the federal court to allow bail in federal habeas review of state proceedings simply because the state does not object. *McGee v. Alaska*, 104 S. Ct. 16 (1983), 20 CLB 164.

U.S. Supreme Court After defendant was sentenced to death in Texas state court for killing two people during the course of a robbery, his federal habeas corpus petitions were denied in the district court and the court of appeals.

The Supreme Court denied the application for a stay, holding that where the grounds on which his request for review were amply evident from his application and from the opinions and proceedings in the lower courts, and where he failed to convince four members of the Supreme Court that certiorari would be granted on any of his claims, he failed to satisfy the basic requirements for the issuance of a stay. The Court thus rejected the claim that a stay on a death row prisoner's first federal habeas corpus petition should be granted as a matter of right. *Autry v. Estelle*, 104 S. Ct. 20 (1983), 20 CLB 164.

U.S. Supreme Court After defendant was convicted of first-degree murder and was

sentenced to death, his appeals were exhausted and the Supreme Court denied certiorari. His petition for habeas corpus was denied in the district court; the court of appeals affirmed; and the Supreme Court again denied certiorari. After the warrant of execution had issued, a second petition was filed, which was denied by the district court and the court of appeals.

The Supreme Court denied the application of the stay of execution, holding that defendant's presentation of claims in a second petition constituted an abuse of the writ where petitioner had presented each of those claims in state court before the first petition was filed and where the substance of those claims may have been presented in the first habeas petition. *Antone v. Dugger*, 104 S. Ct. 962 (1984), 20 CLB 372.

38. SENTENCING AND PUNISHMENT SENTENCING

§ 38.30 Standards for imposing sentence

Court of Appeals, D.C. Cir. After defendant was convicted in the district court of falsely making, forging, and altering securities, he appealed on the ground that the sentencing judge had relied on irrelevant factors.

The District of Columbia Circuit vacated the sentence and remanded, holding that the sentencing judge had improperly relied upon the defendant's alleged membership in the Black Hebrew sect since such a religious sect was protected by the First Amendment. The court observed that its decision would be different if there was evidence linking the defendant with any illegal activities of the Black Hebrew sect. *United States v. Lemon*, 723 F.2d 922 (1983), 20 CLB 374.

§ 38.55 Commutation

U.S. Supreme Court After defendant was convicted in California state court of robbery, murder, and attempted murder, he was sentenced to death. The California Supreme Court affirmed the conviction but reversed the death sentence.

The Supreme Court reversed and remanded, holding that the Eighth and Fourteenth Amendments did not prohibit an instruction regarding the governor's power

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to commute a life sentence. The Court reasoned that the failure of such an instruction to inform the jury of the governor's power to commute a death sentence did not violate the Constitution since the instruction as given did not deflect the jury's focus from the central tasks of undertaking an individualized sentencing determination. *California v. Ramos*, 103 S. Ct. 3446 (1983), 20 CLB 163.

39. THE APPEAL

§ 39.00 Right to appeal

U.S. Supreme Court After petitioners, four Philadelphia police officers, were indicted on civil rights violations, the district court granted the government's motion to disqualify a law firm from its multiple representation of all four petitioners. The Court of Appeals for the Third Circuit affirmed the disqualification.

The Supreme Court reversed, holding that a district court's pretrial disqualification of defense counsel in a criminal prosecution was not immediately appealable and that the court of appeals had no jurisdiction to review the order prior to entry of a final judgment in the case. The Court noted that the rationale behind Section 1291 is to eliminate piecemeal appellate review of trial court decisions that do not terminate the litigation. *Flanagan v. United States*, 104 S. Ct. 1052 (1984), 20 CLB 461.

§ 39.65 Bail pending appeal

U.S. Supreme Court The owner and operator of a theater that had been enjoined by the Michigan state court from displaying an obscene film sought a stay of that order. Petitioner argued that the delay entailed in processing their appeal before the Michigan Court of Appeals—which could extend up to six months—violated the "procedural safeguards" that must attend the imposition by a state of a prior restraint on free speech.

The Supreme Court granted the stay of the preliminary injunction, holding that a stay could be issued where the state supreme court had refused to lift the challenged restraint and had failed to provide for immediate appellate review. *MIC, Ltd. v. Bedford Township*, 104 S. Ct. 17 (1983), 20 CLB 164.

§ 39.66 Stay pending application for writ of certiorari

U.S. Supreme Court After an application was made to the Supreme Court to stay an order of a state district court, Justice Blackmun held that a Supreme Court Justice as circuit justice lacked jurisdiction to act on an application for stay of an order of a state district court committing applicants to jail for refusal to answer questions where the state court had entered an order dismissing the applicants' appeals for lack of an appealable order. *Liles v. Nebraska*, 104 S. Ct. 1020 (1984), 20 CLB 461.

U.S. Supreme Court A federal judge, who was under federal indictment, argued that a sitting judge may not be criminally prosecuted before being removed from office by impeachment and that the government prosecuted him to punish him for judicial decisions. The Court of Appeals for the Ninth Circuit rejected these contentions.

The Supreme Court denied the application for a stay, holding that the argument that a sitting federal judge may not be prosecuted before impeachment had been rejected both by two other courts of appeals and by the Supreme Court as well, citing *United States v. Hastings*, 103 S. Ct. 1188. The Court also held that the court of appeals was correct in concluding that the denial of relief on the "vindictive" prosecution claim was not immediately appealable under the "collateral order" doctrine. *Claiborne v. United States*, 104 S. Ct. 1401 (1984), 20 CLB 463.

40. PROBATION AND PAROLE

§ 40.00 Conditions of probation

U.S. Supreme Court Following revocation of probation by the Georgia state court for failure of defendant to pay a fine, the Georgia Court of Appeals affirmed.

The Supreme Court reversed and remanded, holding that the sentencing court could not properly revoke defendant's probation for failure to pay a fine and make restitution absent evidence and findings that he was somehow responsible for the failure and that alternative forms of punishment would be inadequate to meet the State's interest in punishment and deterrence. *Bearden v. Georgia*, 103 S. Ct. 2064 (1983), 20 CLB 59.

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U.S. Supreme Court After defendant was convicted in state court of first-degree murder, his conviction was reversed by the Minnesota Supreme Court on the ground that incriminating statements made by him had been improperly admitted.

The Supreme Court reversed, holding that while a state may not impose substantial penalties because a witness elects to exercise his Fifth Amendment rights not to give incriminating testimony against himself, a state may require a probationer to appear and discuss matters that affect his probationer's status. In reviewing the record, the Court found that the probationer was not deterred from claiming the self-incrimination privilege by any reasonably perceived threat of revocation of probation. *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984), 20 CLB 462.

§ 40.05 Revocation of probation

§ 40.10 —Procedure

Court of Appeals, 3d Cir. Probationer appealed from an order of the district court revoking his probation and imposing a five-year term of imprisonment.

The Third Circuit held that the refusal to grant immunity to defense witnesses was not error where no representation was made at the hearing that the testimony of the witnesses would be exculpatory and no representation was even made as to what the testimony of the witnesses would be if granted immunity. *United States v. Bazzano*, 712 F.2d 826 (1983), 20 CLB 63.

41. PRISONER PROCEEDINGS

§ 41.05 Cruel and unusual treatment

U.S. Supreme Court An inmate in a Missouri reformatory brought suit in the district court under Section 1983, claiming that a guard had failed to prevent him from being harassed, beaten, and sexually assaulted by his cellmates. The district court entered a verdict against the guard, awarded both compensatory and punitive damages, and the court of appeals affirmed.

The Supreme Court affirmed, holding that a guard may be held liable for punitive damages upon a finding of reckless or careless disregard or indifference to an in-

mate's rights or safety. *Smith v. Wade*, 103 S. Ct. 1625 (1983), 20 CLB 58.

§ 41.70 Transfer of prisoners

U.S. Supreme Court A Hawaii prisoner who had been transferred to a prison in California brought an action claiming a denial of due process rights arising out of reclassification proceedings. The district court dismissed the complaint and the Court of Appeals for the Ninth Circuit reversed.

The Supreme Court reversed, holding that the interstate prison transfer did not deprive the inmate of any liberty interest protected by the due process clause even though the transfer covered a substantial distance. *Olim v. Wakinekona*, 103 S. Ct. 1741 (1983), 20 CLB 58.

42. ANCILLARY PROCEEDINGS

DEPRIVATION OF CIVIL RIGHTS

§ 42.30 In general

U.S. Supreme Court Plaintiff, who pled guilty to manufacturing a controlled substance in Virginia state court, brought a damage action against the police officers who participated in a search of his apartment. The district court granted summary judgment for defendants, but the court of appeals reversed and remanded.

The Supreme Court affirmed, holding that the judgment of conviction on the criminal charges did not bar a subsequent Section 1983 action challenging the legality of the search that had produced the inculpatory evidence, since the guilty plea did not constitute a waiver of Fourth Amendment claims. *Haring v. Prosise*, 103 S. Ct. 2368 (1983), 20 CLB 60.

Court of Appeals, 4th Cir. An inmate brought a civil rights action against a deputy sheriff to recover for injuries sustained when he slipped and fell on a pillow left on stairs by the deputy. The district court granted the deputy's motion for summary judgment, and the inmate appealed.

The Fourth Circuit affirmed, holding that the inmate's claim of negligence failed to state a procedural due process claim because the state's common-law tort action provided the inmate with a remedy

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that would fully compensate him for alleged liberty deprivations. *Daniels v. Williams*, 720 F.2d 792 (1983), 20 CLB 257.

FORFEITURE

§ 42.60 In general

U.S. Supreme Court The district court entered a judgment forfeiting \$8,850 in U.S. currency which claimant failed to declare when she entered the United States, and she appealed. The Court of Appeals for the Ninth Circuit reversed.

The Supreme Court reversed the court of appeals, holding that the eighteen-month delay in filing the claim was justified, since the balancing test applicable to speedy trial claims provides a relevant framework for determining reasonableness of delay in filing a forfeiture action. *United States v. Eight Thousand Eight Hundred & Fifty Dollars*, 103 S. Ct. 2005 (1983), 20 CLB 59.

U.S. Supreme Court Petitioner was convicted of violating the RICO statute by becoming involved in an arson ring that resulted in his fraudulently receiving proceeds in payment for the fire loss of a building he owned. The district court then ordered that the insurance proceeds be forfeited pursuant to 18 U.S.C. § 1963 (a)(1), which provides that a person convicted under Section 1962 shall forfeit to the United States "any interest he has

acquired or maintained in violation of Section 1962," and the Court of Appeals for the Fifth Circuit affirmed.

The Supreme Court affirmed, holding that the insurance proceeds the petitioner received as a result of his arson activities constituted an "interest" within the meaning of the forfeiture provisions of RICO. The Court noted that while the term "interest" is not specifically defined in the RICO statute, it should be assumed that Congress intended that the term be used in its ordinary meaning, which comprehends all forms of real and personal property, including profits and proceeds. *Russello v. United States*, 104 S. Ct. 296 (1983), 20 CLB 258.

U.S. Supreme Court Following a gun owner's acquittal for knowingly engaging in the business of dealing in firearms without a license, the government instituted forfeiture proceedings. The district court struck the owner's defense, but the court of appeals remanded.

The Supreme Court reversed, holding that neither collateral estoppel nor double jeopardy bars a civil forfeiture proceeding following an acquittal on unrelated criminal charges. The Court explained that there is a difference in the burden of proof between a criminal gun control action and a civil in rem forfeiture action. *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099 (1984), 20 CLB 461.

PART V—CONSTITUTIONAL GUARANTEES

43. ADMISSIONS AND CONFESSIONS

GROUND S FOR EXCLUSION; GENERALLY

§ 43.00 Involuntariness and coercion

New Hampshire Defendant was convicted of burglary, theft of firearms, and disposing of stolen firearms. Before trial, defendant moved to suppress his statements to the police, alleging that after his arrival at the police station and before making any statements, he had four times requested and had been denied access to an attorney. The trial court denied the motion to suppress. On appeal, defendant did not claim that his right to counsel was denied but

relied on the rule that the state must prove beyond a reasonable doubt that any confession introduced into evidence was made voluntarily. He argued that his testimony at the suppression hearing concerning threats and promises made by the detective, coupled with the state's failure to call the detective as a witness, was sufficient as a matter of law to create a reasonable doubt as to the voluntariness of his confession.

The New Hampshire Supreme Court affirmed his conviction, holding that the evidence, including the testimony of the arresting officer to whom defendant made an inculpatory statement and the waiver-

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of-rights form signed by defendant, was sufficient to support a finding that defendant's confession was voluntarily made. The only contrary evidence was defendant's own testimony, which was inconsistent with his motion to suppress, and failed to allege that his confession was coerced. *State v. Copeland*, 467 A.2d 238 (N.H. 1983), 20 CLB 470.

§ 43.50 Fruit of an illegal arrest

Court of Appeals, 8th Cir. The United States appealed from the order of the district court granting a suppression motion based upon a statement following an illegal detention, but the court of appeals reversed and remanded.

After defendant's conviction, the Eighth Circuit affirmed, holding that where statements were obtained not by improper exploitation of an illegal arrest but only after intervening events had given the police probable cause to arrest defendant, and where the illegal detention lasted only a few minutes, any connection between the illegal detention and defendant's admission was so attenuated that the admissions were not infected by the prior illegality. *United States v. Maier*, 720 F.2d 978 (1983), 20 CLB 258.

VIOLATIONS OF MIRANDA STANDARDS AS GROUNDS FOR EXCLUSION

§ 43.55 General construction and operation of *Miranda*

U.S. Supreme Court A prisoner filed a petition for a writ of habeas corpus, arguing that his conviction should be reversed because statements made by him to the police about a homicide had been improperly used against him. The district court denied his petition, but the court of appeals reversed.

The Supreme Court reversed and remanded, holding that its decision in *Edwards v. Arizona*, 451 U.S. 477, should not be applied retroactively. The Court explained that while the prisoner's appeal was pending, *Edwards* was decided, which held that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him. The Court reasoned that the constitutional principle established in *Edwards* had little to do

with the truth-finding function of a criminal trial; nor could it be said that the decision had been clearly foreshadowed. Thus law enforcement authorities could not reasonably have been expected to conduct themselves in accordance with the decision prior to its announcement. *Solem v. Stumes*, 104 S. Ct. 1338 (1984), 20 CLB 463.

Court of Appeals, 5th Cir. After defendant was convicted of possession of marijuana with intent to distribute, he appealed on the ground that an incriminating statement made by him had been improperly admitted at trial.

The Fifth Circuit affirmed, holding that while interrogation of defendant after arraignment violated his *Miranda* rights, such error was harmless because the government introduced similar statements made by defendant in response to questions from the border patrol. The court noted that while a post-arraignment statement is a custodial one subject to *Miranda* restrictions, routine questioning at the border does not constitute custodial interrogation. *United States v. Ledezma-Hernandez*, 729 F.2d 310 (1984), 20 CLB 468.

§ 43.60 Prerequisite of custodial interrogation

Court of Appeals, 7th Cir. After defendants were convicted in the district court of conspiracy to commit mail and wire fraud and to travel interstate to commit arson, they appealed on the ground, inter alia, that the statement of one defendant to a co-defendant who was cooperating with the authorities was improperly admitted.

The Seventh Circuit affirmed, holding that the fact that a defendant did not know that a co-defendant was co-operating with the authorities did not transform a voluntary conversation into a custodial interrogation of the defendant for Fifth Amendment purposes. The court thus found that the government did not violate defendant's constitutional right to remain silent by having a co-operating co-defendant tape record incriminating statements made by defendant after he had invoked his Fifth Amendment privilege. *United States v. Burton*, 724 F.2d 1283 (1984), 20 CLB 378.

Hawaii Three police officers approached defendant's house to investigate a claim

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that he had threatened a neighbor with a gun. They informed defendant of the neighbor's complaint and obtained confirmation of his identity. Then one of the officers, who had noticed marijuana plants growing along the walkway, asked defendant if he was aware that growing marijuana plants was illegal, and began uprooting the plants. Defendant responded by exclaiming, "Don't take my plants! . . . I was growing them for my brother . . . I need the money . . ." as the officer quietly continued uprooting the plants. Defendant was charged with promotion of a detrimental drug and terroristic threatening. At trial, defendant moved to have his statements suppressed, on the grounds that he should have received a *Miranda* warning. The motion was granted, and the state appealed.

The Hawaii Supreme Court reversed the trial court holding as to the incriminatory statements. The officer's question and actions were not made in a custodial context, since they were not of a nature that would "subjugate the individual to the will of the examiner." The questions that preceded defendant's self-incrimination fell within the category of general on-the-scene questioning. Defendant's statements were not responsive to the question asked and were unforeseeable. *State v. Paahana*, 666 P.2d 592 (1983), 20 CLB 389.

§ 43.65 —Interpretations by state courts

Connecticut Defendant was convicted of murder. After being arrested and read his *Miranda* rights, he asked to telephone his attorney. He was allowed to telephone from a room in which two police officers were present and able to hear the conversation. Another attorney called him back while he was in the same room and a police officer listened to that consultation also. In both conversations, defendant confessed to the killing. The police officers were allowed to testify regarding these consultations, although tape recordings of the consultations were not allowed in evidence. On appeal, defendant argued that the police testimony regarding his conversations with his attorneys should not have been admitted.

The judgment was set aside and a new trial ordered. The right to consult counsel includes the right to do so without being overheard. For the police or their agents

to eavesdrop on a defendant exercising his *Miranda* rights makes a mockery of those rights. *State v. Ferrell*, 463 A.2d 573 (1983), 20 CLB 261.

§ 43.75 Necessity and sufficiency of warnings

§ 43.80 —Interpretations by state courts

Rhode Island Defendant, convicted of entering a dwelling with intent to commit a felony, argued on appeal that his post-arrest written confession should have been suppressed because he had not been informed adequately of his *Miranda* rights. Before questioning, defendant had been given a printed waiver-of-rights form, containing all of the *Miranda* warnings, which he read aloud without difficulty; he then orally acknowledged his understanding of the enumerated rights and signed the form.

The Rhode Island Supreme Court, following a line of federal cases, held that "it is not essential that *Miranda* warnings be given in oral rather than in written form." The circumstances, it found, demonstrated that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. Accordingly, it concluded that suppression was properly denied. *State v. Appleton*, 459 A.2d 94 (1983), 20 CLB 71.

§ 43.90 Waiver of *Miranda* rights

§ 43.95 —Voluntary and intelligent requirement

Court of Appeals, 2d Cir. After defendant was convicted in the district court on a conditional plea of guilty of bank robbery, he appealed, challenging the denial of his motion to suppress evidence on the ground that *Miranda* warnings had been improperly given.

The Second Circuit affirmed, holding that *Miranda* does not require the interrogator to ask the suspect whether he understands each of his rights, although it is good practice to do so. The court thus found that the fact that defendant was talking most of the time when he was being advised of his rights did not necessarily render the warnings ineffective, especially since defendant "was not a newcomer to the jurisprudence of *Miranda*." *United States v. Hall*, 724 F.2d 1055 (1983), 20 CLB 377.

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§ 43.105 —Effect of request for counsel

New Hampshire Defendant was indicted for second-degree murder for causing the death of a 19-month-old child. He moved to suppress certain statements made in response to police questioning. After a hearing, the trial judge denied the motion as to some statements but granted it as to others. The question of the correctness of the rulings was transferred in advance of trial to the New Hampshire Supreme Court. The specific question transferred was whether defendant had, halfway through the questioning, effectively asserted his right to counsel after having been given the warnings required by *Miranda* at the start of the questioning. The child was found by defendant in a partially filled bathtub at about 2:00 A.M. in the mobile home where defendant was living with the child's mother, Cindi, who was at work. Although defendant made attempts to revive the child and called on a neighbor for help, the child was in fact dead. Defendant was interrogated that night in the local police station without being taken into custody. Two nights later, three law enforcement officers picked up defendant at his home and took him to another town for further questioning, where he was taken to a room in the second police station and given the *Miranda* warnings, which he said he understood. Defendant, however, was not asked whether he waived his rights, nor did he expressly waive them. The questioning began at 8:36 P.M. and ended at 11:14 P.M. during which defendant was under intensive and skillful questioning by the three police officers. It was not until halfway through the questioning that defendant made incriminating statements after the following exchange:

"Defendant: Should I have my lawyer . . .
Corporal: Tap, let me tell you something . . .
Sheriff: I know you didn't do it on purpose.
Corporal: We're not out here to hang you, Tap, we have to get the truth.
Defendant: Cindi is going to kill me.
Corporal: No, she's not going to kill you.
Sheriff: It was an accident wasn't it?
Defendant: It was an accident. I sat him in the tub . . ."

Later on in the questioning defendant asked the following:

"Defendant: Do I need a lawyer for this before I . . .

Sheriff: That's entirely up to you, you've already confessed to us as to what happened. We just want to get this thing straightened out . . .

Defendant: In other words, I've already screwed myself . . ."

After further prodding to get it off his chest, defendant made further incriminating statements regarding the "accident."

The appellate court found that defendant asserted his right to counsel on the two occasions referred to above, and held that on both occasions defendant indicated his lack of understanding of the seriousness of his situation and sufficiently indicated that he was seeking the advice of a lawyer. Therefore, law enforcement officials had a duty to see to it that an opportunity to consult with counsel was provided pursuant to *Miranda* before further questioning. *State v. Tapply*, Cheshire No. 82-476 (1983), 20 CLB 379.

44. CONFRONTATION OF WITNESSES

§ 44.00 In general

§ 44.05 —Interpretations by state courts

Florida Defendant was convicted of first-degree murder. The judge sentenced him to death, despite jury's recommendation of life imprisonment. He appealed both the conviction and the sentence, the sentence on the twin grounds that the jury recommendation was not followed and that the judge, in passing sentence, had taken into account a confession made by a co-defendant found guilty at a separate trial. The co-defendant's confession was not introduced during the guilt-determination phase of the trial.

The conviction was affirmed, but sentence was vacated. The judge was not required to follow the jury recommendation. However, he should not have taken the co-defendant's statements into account in imposing sentence. A defendant is entitled under the Sixth Amendment to confront and cross-examine the witnesses against him. This right has been applied to the sentencing process. Here the considera-

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tion of the confession of a co-defendant was quite different from consideration of a pre-sentence report where defendant has the right and the opportunity to cross-examine. Defendant cannot require a co-defendant to waive his constitutional right to remain silent and force him to testify during the sentencing procedure. *Engle v. State*, 438 So. 2d 803 (1983), 20 CLB 266.

North Carolina State v. Rothwell, 303 S.E.2d 798 (1983). Discussed at § 13.20 *supra*.

§ 44.15 Co-defendant's out-of-court statements

Oregon Defendant was found guilty of murder. He owed money to a drug dealer, and his co-conspirator encouraged him to believe that he would have to kill the dealer if he could not pay his debt. Evidence at the trial that defendant offered to pay the co-conspirator for killing the dealer consisted primarily, but not exclusively, of hearsay testimony as to statements the co-conspirator had made about the conspiracy. Testimony was offered by both a third conspirator and a friend of the co-conspirator that the co-conspirator stated that the defendant had offered him \$14,000 to kill the dealer. The co-conspirator was not available to testify because he planned to assert his privilege against self-incrimination. Defendant appealed on the ground that the admission of hearsay testimony as to his co-conspirator's statements deprived him of his right to confront the witnesses against him. He also questioned the accuracy of the co-conspirator's statements because the co-conspirator used cocaine heavily during the period of the alleged conspiracy.

The Oregon Supreme Court affirmed the murder conviction. The U.S. Supreme Court does allow for a co-conspirator exception to the confrontation clause, but federal courts are split on how broadly the exception applies. Federal rulings mention four reliability factors that must be considered before such testimony is admitted. They are: (1) whether the declaration contained assertions of past fact that might be given undue weight by a jury; (2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; (3) whether the declarant might

be relying on faulty recollection; and (4) whether the circumstances under which the statements were made suggested that the declarant might have misrepresented the defendant's role in the crime. The Oregon court also considered two other factors: whether the evidence was "crucial" to the state's case and whether the statements were made during the course of and in furtherance of the conspiracy. The third conspirator's testimony as to the co-conspirator's statement was appropriately admitted, and it concerned plans rather than past facts. The ruling left open the possibility that the testimony by the co-conspirator's friend was harmless error. *State v. Farber*, 666 P.2d 821 (1983), 20 CLB 388.

§ 44.25 —Limitations on right to cross-examine

Court of Appeals, 5th Cir. State prisoner, who was incarcerated after a conviction of felony theft, petitioned for a writ of habeas corpus on the ground that his cross-examination of a witness had been improperly restricted. The district court denied the petition and an appeal was taken.

The Fifth Circuit affirmed, holding that while precluding a defendant from impeaching a witness through cross-examination about unadjudicated criminal offenses violated the defendant's confrontation right, such error was harmless. The court noted that the evidence of the mailing of defendant's campaign literature with unreimbursed postage from the school district was uncontroverted and defendant's testimony attempting to document the purchase of sufficient postage to mail his campaign literature failed to establish even a plausible case of payment. *Carriello v. Perkins*, 723 F.2d 1165 (1984), 20 CLB 375.

§ 44.35 Use of witness's prior testimony

Iowa Defendant, convicted of robbery, argued on appeal that the State's use at trial of a witness's discovery deposition violated his Sixth Amendment right of confrontation. The deposition had been taken by co-defendant's counsel. Defendant's attorney, who was notified but did not attend, was given a copy prior to trial; he also received a second opportunity to

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depose the witness, Allard, which he did not utilize.

A subpoena was issued for Allard one week prior to the trial; however, the subpoena was returned unserved by a deputy sheriff, with a "diligent search" form endorsed, "Our information indicates subject may be located out of state fishing."

At trial, the court took notice of the unserved subpoena and endorsed form, finding that reasonable efforts had been made to locate Allard and that defendant had sufficient prior opportunity to cross-examine him, the court declared Allard unavailable and granted the prosecutor's application to use his deposition. Defense counsel objected, but refused the court's offer of a continuance to enable defendant to locate Allard.

The Iowa Supreme Court reversed the conviction and ordered a new trial. While there is an exception to constitutional confrontation requirements where a witness is unavailable, it held, a witness is not deemed "unavailable" unless the State has established its good-faith efforts to secure his presence at trial.

Here, the court found that the return of the subpoena and the endorsement on the form were not sufficient to meet the State's burden of proving the witness' unavailability; no one, it stated, "took the stand to provide evidence of constitutionally sufficient efforts to locate him for trial."

The State's contention that defendant waived his right to confront Allard by refusing a continuance was also rejected by the court, which noted that the State, not defendant, was responsible for producing the witness. *State v. Dean*, 332 N.W.2d 336 (1983), 20 CLB 72.

45. RIGHT TO COUNSEL

SCOPE AND EXTENT OF RIGHT GENERALLY

§ 45.05 Right of indigent defendant

Florida The state attorney general brought a petition for a writ of quo warranto to divest respondents, the Public Defender for the Eleventh Judicial Circuit in and for Dade County, Florida, and two Assistant Public Defenders, of authority to accept an appointment by a federal judge to represent indigents in federal court. Defendant, an indigent, had been represented by

respondents in state court and been convicted of various crimes including attempted first-degree murder. Defendant, pro se, filed a petition for writ of habeas corpus in the U.S. District Court for the Southern District of Florida. Defendant did not request appointed counsel. The federal judge, after consulting the state public defender's office, appointed respondent to represent defendant in the federal court. The attorney general's motion attacked the appointment as beyond the powers granted by the federal statute since counsel is provided to indigent clients in federal courts pursuant to 18 U.S.C. § 3006A (1976). The statute specifies that attorneys appointed be drawn from the federal public defender's office or from a panel of private attorneys which may include members of nonprofit legal aid organizations.

The Florida Supreme Court addressed only the issue of the state public defender's authority to accept such an appointment. The court found that respondents had exceeded their statutory authority in accepting the appointment but noted that the appointment had been made and accepted. The court declined to issue the writ of quo warranto because it would place the respondents in an untenable position. Instead the court commended its construction of applicable state law to the consideration of the respondents and the federal judge with the confidence that the appointment would be vacated. *State ex rel. Smith v. Brummer*, 443 So. 2d 957 (1984), 20 CLB 478.

§ 45.20 Right to continuance of trial to obtain new counsel

U.S. Supreme Court Defendant was charged in California state court with robbery and related crimes, and the court assigned a deputy public defender to represent him. Six days before trial, when defendant's counsel became ill, a senior trial attorney in the public defender's office was assigned to represent him. Defendant asked for a continuance during trial, claiming that his newly assigned attorney did not have time to prepare the case, but the attorney told the court he was fully prepared. The continuance was denied, and defendant was convicted. The California

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Court of Appeal affirmed the convictions and the California Supreme Court denied review. Defendant then filed a habeas corpus petition in the district court, which was denied, but the Court of Appeals for the Sixth Circuit reversed.

The Supreme Court reversed and remanded, holding that the state trial court did not deny the right to counsel by denying a continuance, since the Sixth Amendment does not require a "meaningful attorney-client relationship." The Court took note of the fact that the substitute attorney was "ready" for trial, and that the court could properly take into account the interest of the victim in not undergoing the ordeal of yet a third trial. *Morris v. Slappy*, 103 S. Ct. 1610 (1983), 20 CLB 57.

§ 45.25 Waiver

U.S. Supreme Court After defendant was convicted of first-degree manslaughter in Oregon state court for driving with a revoked license while intoxicated, the Oregon Court of Appeals reversed.

The Supreme Court reversed and remanded, holding that while *Edwards v. Arizona*, 451 U.S. 477 (1981), did not hold that the mere initiation of a conversation by an accused after invoking his right to counsel amounts to a waiver, the defendant here did in fact make a knowing and intelligent waiver. The Court observed that the totality of circumstances must be analyzed in determining whether there has been a bona fide waiver, and that in asking, "Well, what is going to happen to me now?" the accused had initiated further conversation for purposes of *Edwards*. *Oregon v. Bradshaw*, 103 S. Ct. 2830 (1983), 20 CLB 61.

Court of Appeals, 4th Cir. After defendant was convicted in the district court of purchasing firearms and other offenses, he appealed on the ground that his confession had been illegally obtained.

The Fourth Circuit remanded for further consideration, holding that while there need not be an explicit statement of waiver by a defendant, every reasonable presumption should be indulged against waiver. The court further found that in order for defendant to have knowledgeably waived his Sixth Amendment rights, he should

have been informed that he was under indictment. *United States v. Clements*, 713 F.2d 1030 (1983), 20 CLB 165.

§ 45.30 —Right to defend pro se

U.S. Supreme Court At his state robbery trial, defendant proceeded pro se, but the trial court appointed standby counsel to assist him over defendant's objection. Following his conviction, defendant unsuccessfully appealed on the ground that his standby counsel interfered with his presentation of the defense. His habeas corpus petition was then denied in the district court, but the court of appeals reversed, holding that his Sixth Amendment rights were violated.

The Supreme Court reversed, holding that defendant's Sixth Amendment right to conduct his own defense was not violated since it appears that he was allowed to make his own appearances as he saw fit and his standby counsel's unsolicited involvement was held within reasonable limits. The Court observed that defendant was accorded the rights of a pro se defendant to control the organization and conduct of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and jury at appropriate points in the trial. *McKaskle v. Wiggins*, 104 S. Ct. 944 (1984), 20 CLB 373.

Illinois Before entering a plea of guilty to charges of murder, armed robbery, rape, and aggravated kidnapping, defendant presented a motion that he be allowed to serve as his own co-counsel. Defense attorney explained that his client wished to conduct some parts of his trial himself. The court denied the motion, and required defendant to choose between self-representation and representation by counsel, whereupon defendant chose to be represented by counsel. The denial of this pretrial motion was one of the grounds on which defendant later appealed to have his guilty plea vacated.

Trial court's judgment was affirmed. A defendant has no right to both self-representation and the assistance of counsel. He must choose one or the other at the proper time and in the proper manner. *People v. Williams*, 454 N.E.2d 220 (1983), 20 CLB 266.

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ADEQUACY AND EFFECTIVENESS OF COUNSEL

§ 45.110 In effectiveness

Court of Appeals, 9th Cir. After defendant was convicted in the district court of conspiracy to defraud the United States and income tax offenses, he appealed on the ground that his retained counsel was ineffective.

The Ninth Circuit reversed, holding that the ineffectiveness of defendant's counsel required reversal even though it was likely that defendant would have been convicted anyway. The court observed that the representation of the accused must be within the range of competence generally demanded of attorneys in criminal cases, and that counsel's failure to conduct a pretrial investigation and consult with his client on key points in this complex case rendered his representation ineffective. *United States v. Tucker*, 716 F.2d 576 (1983), 20 CLB 167.

§ 45.115 —Interpretations by state courts

California The public defender was assigned to represent defendant, who had confessed to crimes that included robbery, rape, and assault with a deadly weapon. The appointment was made after a preliminary hearing had taken place, at which the defendant had chosen to represent himself, although he did not take an active part in the hearing. Defendant, who sought to be committed to a mental hospital, made no affirmative request for counsel, but refused to answer when asked if he could afford counsel and refused to communicate with counsel once appointed. The public defender moved to terminate his appointment on the ground that defendant's actions indicated he rejected the assistance of counsel; the motion was denied. Next, arguing that he was unable to prepare effectively for trial, defense counsel sought a new preliminary hearing or, failing that, a continuance and was again unsuccessful. At the trial, defense counsel sat silently, without asking and questions or potential jurors or of witnesses, without making any arguments, and without presenting any evidence. Defendant was not even present during the trial, since his behavior had led to his expulsion from the courtroom during jury selection. After defendant's conviction, the case was ap-

pealed on the ground that defendant was denied effective assistance of counsel.

Although expressing its reluctance to reward defense counsel's tactics, the California Supreme Court reversed the convictions. "By allowing this defendant to proceed to trial without the assistance of counsel when he had not affirmatively waived his right to such assistance, the court abrogated both its duty to protect the rights of the accused and its duty to ensure a fair determination of the issues on their merits." It was the duty of counsel to proceed with the case, despite adverse rulings of the court and an obstreperous client, and to preserve his points for appeal. Counsel's tactics were not the result of attorney-client collusion, since defendant gave no instructions to counsel. Further, defense counsel's nonparticipation resulted in the inclusion of some arguably prejudicial material during the trial. *People v. McKenzie*, 668 P.2d 769 (1983), 20 CLB 475.

§ 45.120 —Failure to assert available defense

Court of Appeals, 1st Cir. After the district court granted a petition for habeas corpus on the ground of incompetency of counsel, an appeal was taken by the state of Rhode Island.

The First Circuit reversed and dismissed the petition. It held that although petitioner's defense counsel had failed to recognize or appreciate that intoxication may be a defense to first-degree murder and had also failed to interview witnesses, visit the scene of the crime, or make an independent examination of ballistic evidence, petitioner was not entitled to habeas corpus relief. The court explained that petitioner failed to establish that his decision to accept a guilty plea agreement to a charge of second-degree murder was actually and materially influenced by counsel's errors. The court thus found that counsel's errors in this case were not so pervasive that no actual connection need be shown. *Dufresne v. Moran*, 729 F.2d 18 (1984), 20 CLB 464.

§ 45.130 —Failure to introduce evidence or make objections

Court of Appeals, 4th Cir. Defendant appealed from an order of the district court

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denying his petition for a writ of habeas corpus based on a claim of incompetency of counsel.

The Fourth Circuit reversed. It held that habeas corpus relief was warranted since the trial counsel's failure to object to prosecution evidence that defendant had stood on his constitutional rights to remain silent during interrogation denied defendant effective assistance of counsel to a degree that prejudiced the outcome of the trial. The court noted that the failure to raise the issue on direct appeal was not a waiver since the trial counsel also represented the defendant on the unsuccessful appeal to the North Carolina Supreme Court and could not be expected to assert his own incompetence. *Alston v. Garrison*, 720 F.2d 812 (1983), 20 CLB 257.

§ 45.140 —Duty of appellate counsel

U.S. Supreme Court After defendant's petition for habeas corpus based on a claim of ineffective assistance of counsel was denied in the district court, the Court of Appeals for the Second Circuit reversed and remanded.

The Supreme Court reversed, holding that defense counsel assigned to prosecute an appeal from a criminal conviction does not have the constitutional duty to raise every non-frivolous issue requested by defendant. The Court observed that while the accused has ultimate authority to make certain fundamental decisions regarding the case, such as whether to plead guilty or to take an appeal, he does not have the right to overrule the professional judgment of appellate counsel as to the issues to be raised. *Jones v. Barnes*, 103 S. Ct. 3308 (1983), 20 CLB 161.

CONFLICT OF INTEREST

§ 45.150 Representation of co-defendants

Louisiana Defendant and McNabb were charged jointly with theft; they were convicted of the charge after a trial at which both were represented by the same attorney.

After the exhaustion of defendant's appeals, he filed for post-conviction relief, alleging that his right to effective assistance of counsel was violated because of a conflict of interest between himself and McNabb. A hearing ensued, with the court ruling that a conflict of interest existed

because of the disparity in the evidence against defendants: "[T]he case against McNabb was strong and direct, whereas the evidence against [defendant] was weak and circumstantial."

On the State's appeal, the Louisiana Supreme Court reversed. Citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the court stated that where a defendant raises a conflict of interest issue after trial "in order to establish a violation of the Sixth Amendment . . . [he] must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."

Noting that counsel had conducted a vigorous defense for each co-defendant and that no antagonistic defenses existed, the court found that the disparity of the evidence, alone, was insufficient to establish a conflict.

The court also rejected defendant's only other complaint, that he was not permitted by counsel to testify in his own behalf because of the prejudicial effect it would have on McNabb, finding that defendant had not shown how his testimony would have benefited his case.

Although it did not appear from the trial record that the judge had inquired into a possible conflict, the Louisiana high court found that under the circumstances, he had no duty to do so. Finally, it ruled, the evidence adduced at the post-trial hearing established that even if a conflict existed, defendant had knowingly and intelligently waived it. *State v. Edwards*, 430 So. 2d 60 (1983), 20 CLB 73.

RIGHT TO CONFER WITH COUNSEL

§ 45.165 In general

Texas Defendants, convicted for aggravated promotion of prostitution, argued on appeal that the State violated their right to counsel by using an informant to tape record their conversation with defense counsel.

At the direction of prosecutors, the informant, a putative defense witness, had attended and surreptitiously recorded a meeting between defendants and counsel at which trial strategy was discussed. During the meeting, counsel made several highly derogatory remarks about police officers and the criminal justice system, as well as advising defendants on how to avoid future arrest and prosecution by falsifying business records.

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When the recording was played for the jury, counsel moved for a mistrial and to withdraw, on the ground that he had become a witness and could not serve as defendant's attorney. The motion was denied; on summation, the prosecutor made several references to the taped conversation as evidence of a conspiracy to cover up the operation of a prostitution ring.

The Texas Court of Criminal Appeals reversed, finding first that the defense attorney's taped statements were so damaging to his credibility and character that his clients were denied the effective assistance of counsel. Further, stated the court, the State violated defendant's Sixth Amendment right to counsel by directing its agent to record the pretrial consultation and using the tape at trial. *Brewer v. State*, 649 S.W.2d 628 (Crim. App. 1983), 20 CLB 74.

46. CRUEL AND UNUSUAL PUNISHMENT

§ 46.00 In general

U.S. Supreme Court After the district court denied defendant's petition for a writ of habeas corpus, the Court of Appeals for the Eighth Circuit reversed and remanded on the ground that the life sentence constituted cruel and unusual punishment.

The Supreme Court affirmed, holding that the sentence of life imprisonment without the possibility of parole for a defendant convicted of uttering a "no account" check for \$100 and who had three prior convictions was so significantly disproportionate to his crime that it violated the Eighth Amendment. The Court reasoned that since the uttering of a "no account" check was of a nonviolent nature, and defendant's prior felonies were relatively minor, the sentence was improper in view of the fact that it was the most severe that the state could impose on any criminal. *Solem v. Helm*, 103 S. Ct. 3001 (1983), 20 CLB 62.

California Defendant, a seventeen-year-old with no prior criminal record, was tried as an adult and found guilty of felony murder. Defendant got together with seven schoolmates to raid a marijuana farm from which he had been chased at gunpoint twice before. They carried what weapons they could obtain—shotguns and baseball bats—and had discussed the pos-

sibility of overpowering whoever was on guard in order to remove some of the ripened marijuana crop. They were discovered, and defendant, who was hiding with three other boys, saw one of the farmers approaching them from behind, carrying a shotgun. In what he later convincingly testified was a panic reaction, grounded in fear for his life, defendant fired nine shots from his .22 caliber semiautomatic rifle into the farmer, killing him. The jury, expressing discomfort with the felony-murder statute, felt compelled to bring in a verdict of first-degree murder, since the California statute mandates a first-degree verdict where an offender commits a murder in the course of the felony of attempted robbery. The judge, alluding to defendant's immaturity and lack of prior record, committed defendant to the Youth Authority, as the jury had recommended. On appeal, the Youth Authority was found not to have jurisdiction, and defendant's sentence was changed to a life prison term, of which he would have to serve a minimum of sixteen to twenty years. Defendant appealed the sentence on the ground that it was "cruel and unusual punishment" within the meaning of the California Constitution.

The California Supreme Court modified the judgment by reducing the murder conviction to a second-degree murder. The court upheld the constitutionality of the felony-murder statute, but expressed dissatisfaction with a rule that provides only one punishment scheme for all homicides occurring during the commission of or attempt to commit certain offenses. In defendant's case, however, the law resulted in the imposition of a punishment that was disproportionate to the crime committed, and was therefore cruel and unusual within the meaning of the California Constitution. Factors in the finding were defendant's age, his immaturity for his age, his lack of a criminal record, his ability to convince the judge and jury that he feared for his life and had panicked, and the very light sentences imposed on the other boys. *People v. Dillon*, 668 P.2d 697 (1983), 20 CLB 474.

§ 46.05 Death Penalty

U.S. Supreme Court An application for an order vacating a stay of execution of an Alabama state prisoner was filed, which

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the Supreme Court granted. The Court held that in imposing the death sentence, aggravating factors were considered in a nonarbitrary manner where the defendant had been involved in 280 armed robberies and nine kidnappings. *Alabama v. Evans*, 103 S. Ct. 1736 (1983), 20 CLB 58.

U.S. Supreme Court After a Georgia prisoner sentenced to death for murder was denied habeas corpus relief in district court, the Court of Appeals for the Fifth Circuit reversed and remanded.

The Supreme Court reversed the court of appeals, holding that although the Georgia Supreme Court invalidated one of the statutory criteria for aggravating circumstances under which the prisoner was convicted, namely a history of serious assaults, the death penalty need not be vacated, since the jury expressly found the existence of two other statutory aggravating circumstances. The Supreme Court further found that the limited function served by the jury in the finding of statutory aggravating circumstances did not render the scheme invalid. *Zant v. Stephens*, 103 S. Ct. 2733 (1983), 20 CLB 61.

U.S. Supreme Court After defendant was convicted in Florida state court of first-degree murder, a sentencing hearing was conducted before the jury, which recommended life imprisonment. However, the trial judge imposed a death sentence, finding that defendant's criminal record constituted a sufficient aggravating circumstance. The Florida Supreme Court affirmed.

The Supreme Court affirmed, finding that although the trial court's consideration of defendant's criminal record as an aggravating circumstance was improper under state law, the imposition of the death penalty following defendant's conviction was not unconstitutional since the finding of aggravating circumstances was not arbitrary or irrational. *Barclay v. Florida*, 103 S. Ct. 3418 (1983), 20 CLB 162.

U.S. Supreme Court After a Louisiana state prisoner was sentenced to death, he sought habeas corpus in the district court, which denied relief. The Court of Appeals for the Fifth Circuit affirmed the denial of relief but granted a stay of execution.

The Supreme Court vacated the stay, holding that a stay granted pending resolution of a certiorari petition will be vacated unless there is reasonable probability that four members of the Supreme Court would consider the underlying issue sufficiently meritorious. In this case, the Court found that a challenge to a districtwide, rather than a statewide, proportionality review of the death penalty with other cases was not an issue warranting a grant of certiorari. *Maggio v. Williams*, 104 S. Ct. 311 (1983), 20 CLB 255.

U.S. Supreme Court On application for a stay of execution of the death sentence, the Supreme Court held that while the death sentence was qualitatively different from all other sentences, in view of the fact that the case had been in litigation for a full decade, with repetitive and careful reviews by both state and federal courts, as well as the Supreme Court, it was necessary that there be an end to the process of reconsideration. The Court thus refused to reconsider the claim that the Florida death penalty statute had been applied discriminatorily against blacks. *Sullivan v. Wainwright*, 104 S. Ct. 450 (1983), 20 CLB 255.

U.S. Supreme Court Several defendants convicted in Missouri state court of capital murder and sentenced to death sought stays of execution. Their respective convictions and sentences were affirmed by the Missouri Supreme Court on direct appeal, but there was no prior federal review.

The Supreme Court granted the stay, holding that every defendant who has a right of direct review from a sentence of death is entitled to have that review before paying the ultimate penalty. The Court commented that the right to review otherwise is rendered meaningless since it makes no sense to have the execution set on a date within the time specified for that review or before the review is completed. *United States v. McDonald*, 104 S. Ct. 567 (1984), 20 CLB 373.

U.S. Supreme Court After the Court of Appeals for the Fourth Circuit granted a habeas corpus petition asking for a stay of execution, the Supreme Court vacated the

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stay. The Court observed that this was another capital case in which a last-minute application for a stay of execution and a new petition for habeas corpus had been filed with no explanation as to why the claims were not raised earlier. After defendant's murder conviction and imposition of the death penalty, his state remedies and federal habeas corpus remedies were exhausted. The Court thus found that additional applications were an abuse of the writ. *Woodard v. Hutchins*, 104 S. Ct. 752 (1984), 20 CLB 372.

U.S. Supreme Court After the defendant was convicted of a capital crime in California state court and was sentenced to death, the California Supreme Court affirmed, rejecting the claim that the state capital punishment statute was invalid because it failed to require a comparison of defendant's sentence with sentences imposed in similar capital cases to determine whether they were proportionate. Habeas corpus relief was denied in the district court, but the court of appeals held that comparative proportionality review was constitutionally required.

The Supreme Court reversed, holding that the Eighth Amendment does not require proportionality review by appellate courts in every case in which it is requested by the defendant, and the California death penalty scheme is not rendered unconstitutional by the absence of a provision for such a review. *Pulley v. Harris*, 104 S. Ct. 871 (1984), 20 CLB 372.

47. DOUBLE JEOPARDY

§ 47.00 In general

Florida *Gragg v. State*, 429 So. 2d 1204 (1983). Discussed at § 6.15 *supra*.

§ 47.05 —Interpretations by state courts

Maryland Defendant was convicted of premeditated first-degree murder. The State sought imposition of the death penalty under the state capital punishment statute. At his third capital sentencing hearing, defendant again elected to be sentenced by a jury. The jury imposed the death penalty and this appeal followed. Defendant maintained that his third sentencing proceeding

was barred by the double jeopardy clause of the Fifth Amendment. He contended that the trial court's conduct in the second capital sentencing proceeding constituted "judicial overreaching" which barred further resentencing because the trial judge "intentionally and deliberately directed and required the reading of prior recorded trial testimony to the jury."

The Maryland Court of Appeals held that the trial court's conduct did not amount to judicial overreaching even though the sentence imposed was later vacated in *Tichnell II* (427 A.2d 991 (1981)). Rather, the trial judge was mistaken in his belief that it was essential that the transcript of testimony in defendant's original trial be introduced in evidence so as to permit the sentencing jury to have before it the identical testimony that was produced before the fact finder at the guilt or innocence stage of the proceeding. The court's action was not intended to provoke defendant to move for a mistrial. Only where the trial court engages in misconduct with intent to provoke defendant's motion for a mistrial would retrial be barred by the double jeopardy clause. *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083 (1982). Therefore nothing in the bar of double jeopardy prevented a third capital sentencing proceeding in defendant's case. *Tichnell v. State*, 468 A.2d 1 (1983), 20 CLB 472.

Michigan Defendant was convicted by a jury of two counts of armed robbery and one count of possession of a firearm during the commission of a felony for his participation in a holdup of a grocery market. The trial testimony indicated that a young male carrying a sawed-off shotgun entered the market and went to a cash register, pushed the cashier aside, and removed money and checks from the register. He then proceeded to the manager's office, about twenty feet away, where he demanded and received money from a second cashier. The robber ran from the store and was driven away but was later apprehended. On appeal, the issue presented was whether defendant's conviction on two counts of armed robbery violates the double jeopardy provisions of the United States and Michigan Constitutions.

The Michigan Supreme Court held that robbing two cashiers in one grocery store

was not a single offense under the armed robbery statute but two separate and distinct offenses for purposes of the federal and state double jeopardy clauses. The appropriate "unit of prosecution" under the state armed robbery statute is the person assaulted and robbed. The court did not ascribe to the state legislature the intent to inform a criminal that as long as he is robbing one store clerk, bank teller, or bus passenger, he is free to take money from the rest of the persons present without facing the prospect of additional robbery convictions. If two crimes are not the "same offense" under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932), this is a sufficiently clear expression of legislative intent to permit the imposition of multiple punishment. *People v. Wakeford*, 341 N.W.2d 68 (1983), 20 CLB 469.

Oregon On defendant's appeal, the Oregon Supreme Court reinstated the trial court's dismissal. While noting that the contempt adjudication was sought by a private litigant and arose from defendant's violation of a civil injunction, the court did not find these factors dispositive. Rather, it distinguished between civil and criminal contempts as follows:

[W]e have described a penalty for contempt as "civil" when it is imposed in order to compel compliance with an order and will end as soon as the respondent complies, and as "criminal" when it is imposed as punishment for a completed contempt that can no longer be avoided by belated compliance.

Here, continued the court, defendant was found in contempt and punished for entering on his neighbor's land in defiance of a court order; the penalty for contempt was not imposed as a sanction to compel future compliance. Therefore, the contempt proceeding constituted a prosecution for a criminal offense. The prosecution of defendant for trespass following his contempt adjudication, concluded the court, violated Oregon statutes forbidding consecutive prosecutions for offenses based on the same criminal episode, suggesting also that the same reasoning applied under constitutional double jeopardy principles as well. *State v. Thompson*, 659 P.2d 383 (1983), 20 CLB 67.

South Carolina Defendant was convicted of assault and battery of a high and aggravated nature, kidnapping, and four counts of first-degree criminal sexual conduct. On appeal, defendant argued that his convictions for kidnapping and assault and battery of a high and aggravated nature constituted double jeopardy under the test stated in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932), as these crimes are circumstances which may be proven to establish criminal sexual conduct in the first degree.

The South Carolina Supreme Court held that the convictions for kidnapping and assault and battery as well as for criminal sexual conduct did not violate the double jeopardy clause of the Fifth Amendment. The South Carolina legislature has authorized cumulative punishments for kidnapping, assault and battery of a high and aggravated nature, and first-degree criminal sexual conduct. The court stated that the double jeopardy clause does not limit the legislature's power to impose sentences for a given crime, and the legislature could have created a single offense which provided one sentence for kidnapping, and a still greater sentence if the kidnapping resulted in rape. The legislature chose to accomplish this result by two statutes instead of one, citing *Missouri v. Hunter*, — U.S. —, 103 S. Ct. 673 (1983). *State v. Hall*, 310 S.E.2d 429 (1983), 20 CLB 381.

§ 47.20 Mistrials

Idaho Defendant, convicted of aiding and abetting in the delivery of a controlled substance, argued on appeal that double jeopardy principles barred his conviction at a second trial after a mistrial had been declared at the first.

At the earlier trial, defense counsel moved to dismiss the action based on the State's failure to comply with a discovery order, after the jury had been selected and sworn. The motion was denied and a witness called. After the witness had been sworn and direct examination commenced, defense counsel renewed his motion.

The trial court again refused to grant the dismissal motion, but offered to continue the case to afford an opportunity for discovery. Defense counsel agreed and the court then dismissed the jury.

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On the adjourned date, three and a half weeks later, defendant moved for dismissal on the ground that retrial was barred by constitutional double jeopardy protections. The trial court ruled that the earlier proceeding would be deemed a mistrial and denied the motion. Defendant appealed from the ensuing conviction.

On appeal, the Idaho Supreme Court affirmed, finding that defendant had waived his double jeopardy rights and that there were no constitutional barriers to the continued prosecution. Where a defendant requests or acquiesces to a mistrial, double jeopardy will bar a retrial only if prosecutory or judicial misconduct induced the mistrial; further, such misconduct must be intended to provoke the defendant into requesting or consenting to a mistrial. Here, there was no indication that the prosecutor's failure to comply with the discovery order was "intended for the sole purpose of forcing the defendant to request a mistrial"; rather, it appeared to be a negligent error. Accordingly, ruled the court, defendant's agreement to the mistrial operated as a waiver of his double jeopardy rights. *State v. Sharp*, 662 P.2d 1135 (1983), 20 CLB 175.

48. DUE PROCESS

§ 48.00 In general

U.S. Supreme Court After the state of Illinois appealed from an order of the state court dismissing an implied consent hearing to determine whether defendant's driver's license should be suspended for refusing to submit to a breathalyzer test; the Illinois Appellate Court affirmed.

The Supreme Court reversed, holding that a driver's right to a hearing before he can be deprived of his license for failing to submit to a breath analysis test accorded a driver all of the process that the Constitution requires. *Illinois v. Batchelder*, 103 S. Ct. 3513 (1983), 20 CLB 163.

49. EQUAL PROTECTION

§ 49.10 Discrimination in law enforcement

Minnesota Defendant, who was black, was arrested and charged with theft. The charge was based on evidence that defen-

dant participated in the sale of stolen goods to a black undercover officer who was running a so-called sting operation out of a townhouse. Defendant and a number of other defendants whose charges also arose out of the sting operation moved to dismiss before trial on the ground of racially discriminatory enforcement of the law. The motion was denied and a jury found defendant guilty as charged. On appeal, defendant claimed the trial court erred in denying the pretrial motion to dismiss because the state violated the equal protection clause of the federal constitution in selecting defendant and other black defendants for prosecution.

The Minnesota Supreme Court affirmed the conviction, applying the test that was summarized in *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). Under this test, a defendant claiming racially discriminatory law enforcement must establish a prima facie case of racially discriminatory impact and discriminatory intent, purpose, or motive in order to trigger strict scrutiny. Here defendant failed to meet his burden of establishing a prima facie case of racially discriminatory impact by a clear preponderance of the evidence. *State v. Russell*, 343 N.W.2d 36 (1984), 20 CLB 477.

54. IDENTIFICATION PROCEDURES

§ 54.05 Showups

Court of Appeals, 1st Cir. Convicted defendant brought a petition for a writ of habeas corpus, alleging that the initial show-up identification of the defendant as a murderer was so suggestive and unreliable that it prevented a fair trial. The district court denied the defendant's petition and an appeal was taken.

The First Circuit reversed and granted the petition, holding that the show-up procedure at the police station where the witnesses were shown defendant created a substantial likelihood of misidentification which tainted their subsequent in-court identification and entitled defendant to habeas relief. The court noted that defendant was shown to the witnesses at the police station at 3 A.M. and the police officers asked the witnesses, "This is him, isn't it?" *Velez v. Schmer*, 724 F.2d 249 (1984), 20 CLB 376.

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§ 54.10 Suggestiveness of identification procedure

Court of Appeals, 8th Cir. The South Dakota state prisoner who was incarcerated after conviction for kidnapping and rape petitioned for a writ of habeas corpus on the ground, among others, that identification evidence had been improperly admitted at trial. The district court granted the petition.

The Eighth Circuit reversed, holding that the petitioner's constitutional rights were not violated by the state court's admission of the victim's identification testimony, even though a prior out-of-court identification was suggestive. The court observed that in determining whether a suggestive confrontation created a very substantial likelihood of irreparable misidentification of defendant by a witness, the court must weigh the corrupting effect of suggestive identification against the opportunity of the witness to view at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. In weighing these factors, the court found that even though the prior "showup" was impermissibly suggestive, the victim's mere failure to give a prior description of the defendant did not render her trial identification testimony improper. *Graham v. Solem*, 728 F.2d 1533 (8th Cir. 1984), 20 CLB 464.

55. RIGHT TO JURY TRIAL

§ 55.00 In general

§ 55.05 —Procedural requirements

Court of Appeals, D.C. Cir. After defendants were convicted in the district court of conspiracy to commit bribery and soliciting bribery, and another defendant was convicted of conspiring to defraud the District of Columbia, they appealed on the ground that the dual jury procedure used at trial was prejudicial.

The District of Columbia Circuit affirmed, holding that the joint trial of severed defendants before two juries is acceptable in a criminal prosecution as long as it comports with due process. In

evaluating the facts of this particular case, the court concluded that the trial court's decision to use a dual jury, so that the admissions of one of the defendants would not be used against the others, was proper. *United States v. Lewis*, 716 F.2d 16 (1983), 20 CLB 165.

56. PROPRIETY OF EXERCISE OF POLICE POWER

§ 56.00 In general

U.S. Supreme Court After plaintiff brought a civil rights action against Los Angeles seeking to enjoin chokeholds used by city police officers, The district court granted preliminary injunctive relief and the Court of Appeals for the Ninth Circuit affirmed.

The Supreme Court reversed, holding that there was failure to allege a case or controversy, since there was no real or immediate threat that the plaintiff would be choked again or that Los Angeles police routinely applied chokeholds where they were not threatened by use of deadly force. *City of Los Angeles v. Lyons*, 103 S. Ct. 1660 (1983), 20 CLB 58.

§ 56.10 —Automobiles

Illinois Defendant was charged with possessing an automobile with a removed and falsified vehicle identification number (VIN) in violation of the Illinois Vehicle Code. A person convicted of violating this code section would be guilty of a misdemeanor punishable by imprisonment. Defendant admitted that the legislature has the authority to create absolute liability offenses, but contended that this authority is subject to constitutional limitations. He argued that it is arbitrary and unreasonable to impose a statutory duty to inspect and verify the VIN on a mere possessor of a motor vehicle, and that the duty should have been limited to buyers, sellers, owners, etc. He claimed that the code section as applied to him violated due process of law.

After the lower court dismissed the complaint on constitutional grounds, the State brought a direct appeal to the Illinois Supreme Court. The court held that the code section imposing penalties on owners, sellers, buyers, and possessors of

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motor vehicles having a falsified or removed VIN is not arbitrary or unreasonable legislation under the police power since it falls under the category of regulatory measures designed to promote the public welfare and safety. The broad purpose of the legislation is to protect automobile owners against theft. Therefore the code section, although silent on the requirement of scienter, is a regulatory measure that was enacted as part of a general statutory scheme entitled "antitheft laws." As such, it did not require specific intent or knowledge by the possessor of a motor vehicle that the VIN is falsified or removed. *People v. Brown*, 457 N.E.2d 6 (1983), 20 CLB 384.

58. PROHIBITION AGAINST UNLAWFUL SEARCHES AND SEIZURES

SCOPE AND EXTENT OF RIGHT IN GENERAL

§ 58.00 What constitutes a search

U.S. Supreme Court After defendants were convicted in the district court of possession of an illegal substance with intent to distribute, they appealed on the ground that illegally seized evidence had been improperly introduced. The Court of Appeals for the Eighth Circuit reversed, and the Supreme Court granted certiorari.

The Supreme Court reversed, holding that removal by federal agents who had been informed by employees of a private freight carrier that they had observed a white powdery substance in plastic bags concealed in a tube inside a damaged package of the tube and a trace of powder did not constitute a Fourth Amendment search. The Court reasoned that there was no reasonable expectation of privacy, and that while the agents had "seized" the package, such warrantless seizure was not unreasonable. The Court also held that the federal agents were not required to have a warrant before testing a small quantity of powder to determine whether it was cocaine. *United States v. Jacobsen*, 104 S. Ct. 1652 (1984), 20 CLB 463.

Texas Defendants, convicted of possessing marijuana, argued on appeal that the contraband should have been suppressed as the product of an unlawful, warrantless search of defendant Bousley's apartment.

A building maintenance man, while performing repairs in the apartment, had observed two defendants smoking marijuana and the three other defendants weighing and bagging quantities of the substance; he immediately notified the building manager, who summoned police. Within minutes, several officers arrived at the premises, proceeded to Bousley's apartment, knocked on the door and identified themselves. When Bousley opened the door, the officers smelled the odor of burning marijuana and saw the substance inside the apartment. The marijuana was seized and defendants placed under arrest.

On appeal, the Texas Court of Criminal Appeals, en banc, found that, although defendants were in private quarters, they chose not to preserve their privacy but to conduct their illegal activities in front of a member of the public, the maintenance man; this, the court continued, demonstrated that they had no reasonable expectation of privacy in the premises. Absent such an expectation of privacy, it could not be said that defendants were "searched" within the meaning of the Fourth Amendment.

The court rejected defendants' argument that police had no right to enter the apartment to investigate reported possession of marijuana, stating:

[N]othing in our Constitution prevents a police officer from addressing questions to citizens on the street; it follows that nothing would prevent him from knocking politely on any closed door. Further, nothing in the statutes or governing constitutional provisions requires any citizen to respond to a knock on his door by opening it. Indeed, the very act of opening the door exhibits an intentional relinquishment of any subjective expectation of privacy, particularly when illegal activity may be readily detected by smell and sight by anyone standing at the doorway.

As no search warrant was required and the officers observed defendants' commission of an offense, the warrantless arrests were also held lawful. *State v. Rodriguez*, 653 S.W.2d 305 (Crim. App. 1983), 20 CLB 172.

§ 58.03 Property subject to search

Florida A state trooper and a local police officer entered defendant's automotive re-

pair shop to check a truck that they suspected had an altered identification number. They located the truck on defendant's property, ascertained that the identification number had been changed, seized the truck, and arrested defendant. Defendant filed a motion to suppress, alleging that the statute providing for warrantless administrative searches of junkyards, motor vehicle repair shops, and other establishments dealing with salvaged motor parts unconstitutionally allowed warrantless searches and seizures in violation of the Fourth Amendment as well as the state constitution. The trial court declared the statute unconstitutional, and on appeal the district court reversed.

The Florida Supreme Court found the statute constitutional since it is limited to business establishments that easily could be involved in the theft and unlawful disposition of vehicles and is restricted to normal business hours. The owners of subject businesses are on notice by the clear language of the statute that their premises will be inspected. *Moore v. State*, 442 So. 2d 215 (1983), 20 CLB 470.

§ 58.05 Constitutionally protected areas

U.S. Supreme Court After two homeowners were charged with arson, the Michigan state trial court denied their motion to suppress evidence, and an appeal was taken. The Michigan Court of Appeals reversed, holding that no exigent circumstances existed to justify the search. The record showed that five hours after a fire destroyed the premises, a team of arson investigators conducted an extensive search of the premises without obtaining either consent or an administrative warrant. The investigators determined that the fire was caused by a timing device and seized the incriminating evidence.

The Supreme Court held that a criminal warrant is required when the primary object of a search is to gather evidence, and an administrative warrant will suffice if the primary object is to determine the cause and origin of the fire. The Court reasoned that defendants had a reasonable expectation of privacy in the fire-damaged home since they had made arrangements to secure the premises following the fire. *Michigan v. Clifford*, 104 S. Ct. 641 (1984), 20 CLB 373.

Georgia Defendant was convicted of murder for killing a grocery clerk during the course of a robbery. An anonymous witness telephoned a report of the crime to the police and gave a description of the getaway car. Police stopped the car and conducted a search which uncovered the murder weapon and ammunition; defendant and a co-defendant, who had been in the car, were placed under arrest. After *Miranda* warnings, both gave statements in which they admitted stealing the car and pistol two days earlier, as well as admitting their involvement in the robbery-murder.

On appeal, defendant argued that the warrantless search of the vehicle was unlawful and the products of the search, i.e., the weapon and his incriminating statement, should have been suppressed. The Georgia Supreme Court rejected defendant's contention, ruling that under *Rakas v. Illinois*, 439 U.S. 128 (1978), defendant had no legitimate expectation of privacy in the stolen car and no possessory interest in the stolen property seized. Since both the search and the discovery of the pistol were lawful, the ensuing arrest was based upon probable cause and defendant's subsequent statements were not inadmissible. *Sanborn v. State*, 304 S.E.2d 377 (1983), 20 CLB 174.

§ 58.10 Property subject to seizure

§ 58.15 —Plain view

U.S. Supreme Court After defendant pled nolo contendere in Texas state court to the offense of possession of heroin, the Texas Court of Criminal Appeals reversed and remanded on the ground that the warrantless seizure of a balloon in the hand of an automobile driver was illegal.

The Supreme Court reversed the judgment of the Texas appeals court and reinstated the conviction, holding that where the officer validly stopped the automobile as part of a routine license check and saw the knotted balloon in the driver's hand, the seizure of the balloon was proper under the plain view doctrine. The Court particularly noted that when the officer shifted his position to get a better view, he noticed small plastic vials, loose white powder, and an open bag of party balloons in the glove compartment. In so holding, the Court rejected the argument that for the plain view doctrine to apply, it

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must be "immediately apparent" to the police that they have incriminating evidence before them at the time of seizure. *Texas v. Brown*, 103 S. Ct. 1535 (1983), 20 CLB 57.

U.S. Supreme Court Defendant, charged with two counts of possession of a controlled substance, moved to suppress evidence based upon the warrantless search of his sealed container at a police station. The motion was granted in the district court and the Illinois Appellate Court affirmed.

The Supreme Court reversed and remanded, holding that there was no substantial likelihood that the contents of the shipping container previously found by the police to contain illicit drugs was changed during the brief period that it was out of sight of the surveilling officer. The Court reasoned that once the container had been found to contain illicit drugs, the contraband became like objects physically in plain view, so that the claim of privacy was lost and the subsequent reopening of the container was not a "search" within the scope of the Fourth Amendment. *Illinois v. Andreas*, 103 S. Ct. 3319 (1983), 20 CLB 162.

Court of Appeals, 2d Cir. After defendant was convicted of conspiring to damage buildings by means of explosives, he appealed on the ground that a tape cassette had been unlawfully seized during a search of his house.

The Second Circuit affirmed, holding that the tape cassette inside a clear envelope had been lawfully seized under the plainview doctrine, and that the officers were not required to get a separate warrant before playing the cassette. The court reasoned that there was no expectation of privacy as to the cassette because the envelope containing the cassette bore the inscription "Tap on [specified person]." *United States v. Bonfiglio*, 713 F.2d 932 (1983), 20 CLB 165.

§ 58.30 —Automobile searches

U.S. Supreme Court Two police officers stopped a car that was traveling erratically, and after asking the driver for identification, the officers observed a hunting knife on the floorboard of the car. A further search of the car uncovered quantities

of marijuana. Defendant was convicted and, while the Michigan Court of Appeals affirmed, the Michigan Supreme Court reversed.

The Supreme Court reversed, holding that the protective search of the passenger compartment of the car during a lawful investigatory stop was reasonable. The Court noted that the search was limited to those areas in which a weapon may be placed or hidden and the officers had reason to believe that the suspect was dangerous. *Michigan v. Long*, 103 S. Ct. 3469 (1983), 20 CLB 163.

§ 58.35 —Airplane passengers

Courts of Appeals, 6th Cir. After defendant was convicted in the district court of possession with intent to distribute marijuana, he appealed on the ground that he had been improperly detained at the airport.

The Sixth Circuit vacated and remanded, holding that defendant had been improperly "seized" at the airport when he was confronted by a DEA agent who asked him clearly incriminating questions as well as for his license and ticket. The court also relied on the fact that defendant was not told that he was free to leave. In so holding, the court concluded that the facts that defendant checked an empty suitcase when flying from Detroit to New York, and his suitcase appeared to be weighted upon his return, and that defendant exhibited elements of the drug courier profile did not provide a reasonable basis for seizure of his person at the airport. *United States v. Saperstein*, 723 F.2d 1221 (1983), 20 CLB 375.

§ 58.40 —Border searches

U.S. Supreme Court After defendant was convicted in the district court of possession of narcotics, the Court of Appeals for the Second Circuit reversed on the ground that evidence had been improperly seized.

The Supreme Court affirmed, holding that while the investigative detention of a traveler's luggage is permissible on less-than-probable cause, the ninety-minute detention of defendant's luggage was unreasonable. The Court noted that the violation of Fourth Amendment rights was exacerbated by the agent's failure to tell

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the defendant where they were taking the luggage, how long they would keep it, and how they would return it to him. *United States v. Place*, 103 S. Ct. 2637 (1983), 20 CLB 61.

§ 58.43 —Inventory searches

Tennessee Defendant, convicted of possessing controlled substances, argued on appeal that police officers exceeded the permissible scope of an automobile inventory search by opening closed containers found in the trunk after the vehicle was impounded.

While operating the auto, defendant was stopped for speeding and reckless driving. The officers, observing drugs and drug paraphernalia in the passenger compartment, arrested defendant and impounded the auto. In the course of inventorying its contents, the officers found a closed suitcase and briefcase in the trunk and, opening same, discovered them to contain heroin, LSD, cocaine, and marijuana.

The intermediate appellate court ruled that the drugs should have been suppressed as it was not lawful, absent exigent circumstances, to open the suitcase and briefcase. On the State's ensuing appeal, the Tennessee Supreme Court disagreed and reinstated the conviction.

The court recognized that there is no consensus among the jurisdictions on whether inventorying the contents of a closed container found in a lawfully impounded car is reasonable or unreasonable absent exigent circumstances.

However, it noted that an inventory search is not based on probable cause or exigent circumstances, but that:

[T]he purpose of inventorying the contents of a vehicle, pursuant to a valid impoundment, is not to search for incriminating evidence but to protect the owner's property while it remains in police custody, and also, to protect the police against claims of lost or stolen property.

Finding that the inventory search in this case had a legitimate purpose and was not a pretext to obtain incriminating evidence against defendant, the court concluded that no intrusion on defendant's rights had occurred. *State v. Glenn*, 649 S.W.2d 584 (1983), 20 CLB 66.

§ 58.45 —Official governmental inspections

U.S. Supreme Court After defendants were convicted in district court on drug charges, they appealed on the ground that the search of their ship was illegal. The Court of Appeal for the Fifth Circuit reversed.

The Supreme Court reversed, holding that customs officials, acting pursuant to a statute authorizing them to board any vessel at any time and place in the United States and to examine the vessel's manifest even absent suspicion of wrongdoing, did not violate the Fourth Amendment by boarding and inspecting the vessel located in waters providing ready access to open seas. *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983), 20 CLB 60.

Montana During a warrantless administrative search of packages being sent from Hawaii to the mainland pursuant to the Federal Plant Pests Act, a federal agricultural inspector found what proved to be hashish. The Hawaii police were alerted, and they in turn contacted the police in the addressee's hometown of Bozeman, Montana, and arranged to send the package to the Bozeman police. The police in Bozeman arranged for UPS to deliver the package, witnessed its delivery to defendant's residence, and obtained a warrant to search defendant's house. Defendant was arrested, tried, and found guilty of possession of dangerous drugs with intent to sell. Defense appealed on the ground that the warrantless search and seizure of the package was unconstitutional.

The Montana Supreme Court affirmed the conviction. A government official is entitled to make a warrantless search of a package where there is a significant public protection involved, the intrusion is minimal, the goal is not discovery of a crime, and the purpose would be thwarted or rendered impracticable by requiring a search warrant. Since all of these elements were present, the search was a reasonable administrative search. Further, once the hashish was uncovered, the federal agricultural agent had the right to seize the package under the "plain view" rule, which allows warrantless seizure of evidence of crime inadvertently discovered by police in the course of a valid search. *State v. Kelly*, 668 P.2d 1032 (1983), 20 CLB 475.

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§ 58.55 Search of parolees

Court of Appeals, 2d Cir. After defendant was convicted in the district court of illegal possession of U.S. Treasury checks, he appealed on the ground that evidence had been improperly seized from his person and his office.

The Second Circuit affirmed, holding that a parolee has a diminished expectation of privacy for his person and clothing and, as a result, upon discovery by the officer of defendant's previous drug conviction, his request that defendant roll up his sleeves and his examination of defendant's person was not unreasonable. The court noted that a parolee possesses fewer constitutional rights than ordinary citizens, and a parolee's diminished expectation of privacy is further diminished while he is in his parole officer's office. *United States v. Thomas*, 729 F.2d 120 (1984), 20 CLB 466.

§ 58.60 Search of prisoners

North Dakota State v. McKercher, 332 N.W.2d 286 (1983). Discussed at § 13.170 *supra*.

§ 58.70 Stop and frisk

Louisiana Defendant, convicted of possessing LSD and marijuana, argued on appeal that his motion to suppress the physical evidence seized at the time of his arrest was erroneously denied.

At a hearing on defendant's motion, police officers testified that they observed defendant hand a clear plastic bag containing brown vegetable matter to a companion. Believing the bag to contain marijuana, the officers identified themselves, whereupon defendant's companion threw the bag over his shoulder; the bag was retrieved and marijuana found inside. Defendant and his companion were arrested and, during the ensuing search of defendant's person, LSD was recovered.

The Louisiana Supreme Court affirmed the conviction. The officers' observations, it found, may not have amounted to probable cause sufficient to justify an arrest but were enough to stop and question defendant and his companion.

As there was no "unlawful intrusion into defendant's right of freedom from governmental interference," it said, the property abandoned by defendant's com-

panion could be seized lawfully. Only where police do not have the right to make an investigatory stop would it be unlawful to seize property abandoned as a result of such a stop.

Finding that the initial stop and the arrest after recovery of the contraband were both lawful, the court concluded that the subsequent incidental search of defendant's person was lawful as well. *State v. Andrishok*, 434 So. 2d 389 (1983), 20 CLB 176.

Virginia Stolen property was found on defendant's person when a van in which he was a passenger was stopped for reckless driving and for attempting to elude police. The three occupants of the van were detained by the first officer on the scene, who took their names. A second police officer arrived shortly in answer to the first officer's call for assistance and helped the first officer to pat down the three men. In removing a rectangular brass box from defendant's shirt pocket, police also inadvertently removed a credit card and a rosary.

The credit card was not in the defendant's name, and the rosary also proved to be stolen. Stolen jewelry was also found on defendant's person when he was searched either just before or just after he was arrested for possession of the stolen credit card—police testimony was unclear on this point. At his robbery trial, defendant moved to have the credit card, rosary, and jewelry suppressed, contending that they were the products of an illegal detention, search, and seizure. The motion was denied, and he appealed his conviction.

The Virginia Supreme Court upheld defendant's conviction. Under Virginia law, a police officer may detain a person whom he reasonably suspects of involvement in a felony or of possession of a concealed weapon and may search the suspect for a weapon if he fears that the suspect intends him bodily harm. The search met this standard, as well as the standard set by the Supreme Court decision in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), which allows a police officer who suspects "criminal activity may be afoot" to search a suspect's outer clothing for a concealed weapon that "might be used to assault him." The first police officer suspected that a vehicle driven so recklessly as the van might be fleeing the scene of a crime.

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The fact that he radioed for assistance showed that he did in fact have some concern for his own safety, based on the totality of circumstances. Although defendant did nothing to indicate he possessed a concealed weapon, the fact that the first officer to arrive had been confronting three men alone in an unlit area made it reasonable for him to ask the second officer on the scene to pat them down. It was also reasonable for police to remove the brass box when patting down defendant revealed a hard object under his jacket that could have been a weapon; thus, the inadvertently disclosed credit card and rosary were admissible as evidence. Once the stolen credit card was revealed, police had probable cause to arrest defendant; thus, the search of defendant's person in which the jewelry was revealed was permissible as a search incident to arrest, whether it occurred immediately before defendant's arrest or immediately after. *Lansdown v. Commonwealth*, 308 S.E.2d 106 Va. (1983), 20 CLB 265.

BASIS FOR MAKING SEARCH AND/OR SEIZURE

§ 58.75 Search warrant

§ 58.80 —Sufficiency of underlying affidavit

U.S. Supreme Court Acting on an anonymous letter stating that respondents were engaged in selling drugs and setting forth details of their activities, the Illinois police obtained a search warrant for respondents' residence and automobile. When marijuana and other contraband were found, respondents were charged with state drug law offenses, but the trial court suppressed the evidence, and the Illinois Supreme Court affirmed.

The Supreme Court reversed, holding that the rigid "two-pronged test," under *Aguilar* and *Spinelli*, for determining whether an informant's tip establishes probable cause for issuance of a warrant would be abandoned and a "totality of the circumstances" approach that traditionally has informed probable cause determinations would be substituted in its place. The Court observed that probable cause for the warrant was established here by the anonymous letter indicating that the respondents were engaged in criminal ac-

tivities and were planning future illegal acts, especially where major portions of the letter's predictions were corroborated by information learned by federal agents. *Illinois v. Gates*, 103 S. Ct. 2317 (1983), 20 CLB 59.

§ 58.90 —Manner of execution

New York Defendant, convicted of criminal possession of cocaine and marijuana, contended on appeal that his motion to suppress should have been granted because police officers entered his residence without possessing a search warrant. Police were advised that a warrant had been issued, but did not yet have it in their possession when the entry was made. After entering the premises and placing defendant in custody, however, they did not conduct a search until the warrant was delivered to them.

The New York Court of Appeals affirmed, holding that federal and state constitutional requirements that a search and seizure be authorized in advance by a neutral magistrate had been fully complied with. The officers' actions in no way violated defendant's "right to be free from unreasonable government intrusions" and accordingly it found no grounds for suppression. *People v. Mahoney*, 448 N.E.2d 1321 (1983), 20 CLB 65.

§ 58.100 —Necessity of obtaining a warrant

New York *People v. Mahoney*, 448 N.E.2d 132 (1983). Discussed at § 58.90 *supra*.

§ 58.105 Search incident to a valid arrest

U.S. Supreme Court The State of Illinois appealed from an order of a state court judge, which suppressed evidence obtained during a warrantless search of defendant's shoulder bag subsequent to his arrest for disturbing the peace. The Illinois Appellate Court affirmed.

The Supreme Court reversed and remanded, holding that the search of arrestee's bag was a valid inventory search, and the fact that the protection of the public and arrestee's property could be achieved by less intrusive means did not render the search unreasonable. *Illinois v. Lafayette*, 103 S. Ct. 2605 (1983), 20 CLB 61.

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§ 58.120 —Manner of making arrest or entering premises as affecting validity of subsequent arrest or search

Court of Appeals, 5th Cir. The government appealed from an order of the district court suppressing defendant's post-arrest confession as a fruit of an unlawful arrest.

The Fifth Circuit reversed, holding that even if the arrest warrant, which was issued after an unchallenged finding of probable cause, was invalid on the ground that it did not identify the defendant with sufficient particularity, the exclusionary rule was inapplicable pursuant to the "good faith" exception where the actions of the state law enforcement agents were taken in a reasonable and good-faith belief that they were legal. *United States v. Mahoney*, 712 F.2d 956 (1983), 20 CLB 64.

Illinois The state appealed from the circuit court's decision to suppress evidence obtained by police, including defendants' confessions, and to quash their arrests. A police surveillance team, acting on a tip from an informant that implicated the car used by defendants in a series of Fotomat robberies, followed the car and observed a passenger, one of the defendants, enter a restaurant and run back. They followed the car back to an apartment complex, learning en route that the restaurant had been robbed. The team then went to the door of an apartment where they had "information" that they would find defendants. Having overheard talk about splitting up money and saving some for bond, they knocked and got one of the defendants to open the door on a chain by asking "Mark, why weren't you at work today?" The police team broke the chain, entered with their guns drawn, and handcuffed the defendants. They obeyed written consent to a police search of the car and apartment and obtained confessions that were later put in writing at the police station. In the course of their search, they pried open a metal box without asking for the key. The circuit court was extremely critical of police attitude, and noted that the six-to-ten-man surveillance team should have been able to keep subjects under surveillance while applying for a warrant.

The case was reversed and remanded. Police had probable cause to proceed to

the apartment, since events up to that point tended to corroborate informant's tip. The fact that police had reason to believe that defendants were armed and had just committed a robbery was sufficient to justify police entry into the apartment without a warrant and without identifying themselves, under the "exigent circumstances" exception application in emergencies. Search of the rooms in which defendants were apprehended was lawful as a search incident to arrest, and, since there was no testimony that the consent form was obtained under duress, search of the remainder of the apartment was also valid. *People v. Winters*, 454 N.E.2d 299 (1983), 20 CLB 264.

§ 58.130 Investigative stops

Court of Appeals, 11th Cir. After defendant was convicted of possession of an unregistered firearm, he appealed on the ground that the evidence had been obtained as a result of an illegal search.

The Eleventh Circuit reversed, holding that the search was illegal, since at the time the officer requested a vial in the defendant-driver's possession, a reasonable person whose license had been retained by the officer would have believed he was not free to leave and therefore the encounter had matured into an investigative stop protected by the Fourth Amendment. *United States v. Thompson*, 712 F.2d 1356 (1983), 20 CLB 64.

ELECTRONIC EAVESDROPPING

§ 58.135 In general

Court of Appeals, 1st Cir. Defendants, who were convicted on drug conspiracy charges, appealed from the decision of the district court denying their motions to suppress wiretap evidence.

The First Circuit reversed their convictions, holding that the Massachusetts wiretap statute authorizing application for a warrant order to be made by an assistant district attorney does not conform with the minimum requirements under Title 3 of the federal electronic surveillance law. The court reasoned that state wiretap laws are preempted by the federal statute and under Title 3, the principal prosecuting attorney of a state or political subdivision cannot delegate his responsibility under Title 3 to make an independent judgment as to the need for electronic surveillance.

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United States v. Smith 712 F.2d 702 (1983), 20 CLB 62.

Nebraska Defendant, charged with dealing in dangerous drugs, moved to suppress evidence obtained through the interception of his telephone conversations pursuant to a court-authorized wiretap order covering telephones at his residence and a number of bars he frequented; he argued, *inter alia*, that the warrant application was defective because it did not establish that "other investigative methods had been tried and failed or that other procedures were unlikely to succeed or were too dangerous" to employ.

The application recited facts showing that defendant had been under investigation for a period of months; that reliable informants had supplied information that defendant was a supplier of cocaine; that surveillance of defendant had been unproductive and would not likely be fruitful since law enforcement officers were seldom able to gather sufficient evidence to arrest drug dealers based upon surveillance, given the clandestine nature of such activities; and that it was unlikely that undercover agents would be able to infiltrate defendant's operation.

Defendant's motion was granted and the state appealed.

On appeal, the Nebraska Supreme Court reversed and remanded for trial. It recognized that defendant was correct in arguing that eavesdropping devices "may not be the initial step in a criminal investigation" and that the use of such investigatory methods cannot be indiscriminate; an application for an eavesdropping warrant, it noted, must satisfy the issuing judge that other methods have been tried and failed or that such methods are unlikely to succeed or too dangerous to use.

However, the court held that, "the telecommunications statute does not require an exhaustion of all other possible, or even all other reasonable, avenues of investigation prior to the interception of telephonic communications."

Here, it found, the application was sufficient because it established that surveillance was unworkable, infiltration of defendant's group would be difficult, and that defendant conducted his operation from different locations. Accordingly, it held that suppression had been ordered erroneously. *State v. Brennen*, 336 N.W.2d 79 (1983), 20 CLB 181.

§ 58.140 —Consent of one of parties to telephone conversation

Court of Appeals, 1st Cir. After defendant was convicted in the district court of possession and passing of counterfeit money, he appealed on the ground that his conversations had been illegally intercepted.

The First Circuit affirmed, holding that the listening in to a telephone conversation on an extension with the consent of one party does not violate the rights of the other party under either the Fourth Amendment or the eavesdropping control law. The court explained that the conversation was overheard by an accomplice who, in cooperation with the police, recorded a three-way conference call on the telephone and was known by the defendant to have had an accomplice "on the other line" during a conversation about counterfeit bills. *United States v. Miller*, 720 F.2d 227 (1983), 20 CLB 259.

§ 58.160 Disclosure of conversations overheard

Court of Appeals 1st Cir. After a motion for disclosure of certain documents involving electronic interceptions at a law office were denied, movants appealed on the ground that such documents were needed to determine whether their representing of clients had been interfered with.

The First Circuit affirmed, holding that the district court did not abuse its discretion in denying the motion because a grand jury investigation was pending and the district court, after careful in camera inspection of the material, found that there had been no interference with movants' representation of their clients and that the need for secrecy continued. The court further observed that movants had important remedies if the district court's findings proved to be incorrect, and none of the movants had been indicted or even subpoenaed to appear before the grand jury. *In re Application of the United States for an Order*, 723 F.2d 1022 (1983), 20 CLB 374.

SUPPRESSION OF EVIDENCE IN GENERAL

§ 58.200 Standing

Court of Appeals, 2d Cir. After defendants were convicted in the district court

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of possession of a controlled substance on board a vessel, they appealed on the ground that the search of the vessel was illegal.

The Second Circuit vacated and remanded on other grounds, holding that since the crew members of the vessel had no proprietary interest in the vessel's cargo and had no legitimate expectation of privacy in it, they had no standing to challenge the seizure of marijuana from the cargo hold. The court further found that there was a reasonable basis for suspecting that the vessel was engaged in smuggling of narcotics and there was a minimal show of force in the stopping and boarding. *United States v. Pinto-Mejia*, 720 F.2d 248 (1983), 20 CLB 259.

60. RIGHT TO SPEEDY TRIAL

§ 60.05 Length of delay

Court of Appeals, 2d Cir. Following his transfer to Vermont, a California prisoner was convicted by the U.S. District Court for the District of Vermont. He appealed on the grounds that his speedy trial rights had been violated.

The Second Circuit affirmed, holding that a 249-day delay in bringing a prisoner to trial did not violate speedy trial provisions where the delays were chargeable to the defendant. The court noted that the defendant requested additional time to procure an attorney, to suppress evidence, to procure a transcript of his state trial, and to subpoena available witnesses. *United States v. Scheer*, 729 F.2d 164 (1984), 20 CLB 466.

§ 60.20 Reason for delay

§ 60.25 —Interpretations by state courts

Kansas Defendant was arrested September 7 for misdemeanor possession of marijuana and released on bond. The district attorney waited to file a complaint until a chemical analysis of the marijuana was received. As a result of a backlog at the government laboratory, no complaint was filed until April 2 of the following year. A new bond was issued, and arraignment took place April 22. Trial was

set for June 30. Defendant moved for a dismissal on the basis of his right to a speedy trial. The trial court granted the dismissal. It found that for purposes of the Kansas statutory limit of 180 days between arraignment and trial, arraignment took place on November 5, the appearance date set on the bond issued the day defendant was arrested.

Judgment of conviction was affirmed. The court considered both defendant's statutory and constitutional rights to a speedy trial. It found that arraignment took place April 22, well within the state limit of 180 days before trial. A court appearance made before a complaint is filed is not an arraignment. Defendant's constitutional rights were not violated either, since the delay did not result in any prejudice to defendant. *State v. Rosine*, 664 P.2d 852 (1983), 20 CLB 262.

§ 60.35 Requirement of prejudice

Court of Appeals, 5th Cir. Petitioner, who had been convicted of attempted murder, brought a habeas corpus petition based on an alleged violation of his speedy trial rights, which was denied in the district court.

The Fifth Circuit affirmed, holding that petitioner's Sixth Amendment right to a speedy trial was not violated. The court explained that the gravity of the alleged crime is a consideration in resolving speedy trial claims, and that while a ten-month delay between arrest and time of trial would be excessive where the alleged offense could result in only brief imprisonment, such a delay was not excessive in this case in view of the seriousness of the crime, as evidenced by a sentence of thirty years of hard labor. *Gray v. King*, 724 F.2d 1199 (1984), 20 CLB 378.

Alabama Defendant was convicted of sexual abuse of his 16-year-old sister-in-law. On certiorari to the Alabama Supreme Court, defendant contended that he was denied a speedy trial and unjustly prejudiced by the delay. The gist of his argument was that his trial was postponed at least twice upon the state's motion. During this delay, a change in the law became effective, and the 2-1 peremptory strike was abolished and replaced with a 1-1 jury strike.

The appellate court ruled that the grant-

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ing or withholding of peremptory challenges is solely a matter of procedure even though peremptory challenges are an inherent part of the jury trial. The court concluded that it has not been elevated to the

status of a constitutionally guaranteed right, citing *United States v. Morris*, 623 F.2d (10th Cir. 1980). *Ex parte Cofer*, 440 So. 2d 1121 (1983), 20 CLB 383.

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